United States Court of Appeals

for the Second Circuit

APPENDIX

76-2084

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

BOSSIE LEE HOLLAND :

Petitioner-Appellant:

-against- :

COUNTY COURT OF NASSAU COUNTY, :

Respondent-Appellee :

- -x

B

P/S

DOCKET NO. 76-2084

APPENDIX FOR PETITIONER-APPELLANT

JAMES J. McDONOUGH
Attorney for Petitioner-Appellant
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York

OF COUNSEL:

MATTHEW MURASKIN
MICHAEL J. OBUS

UNITED STATES COURT OF APPEALS
FILED
OCT 7 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

APPENDIX

	Page No.
MEMORANDUM AND ORDER DENYING PETITION	A-1
NOTICE OF APPEAL	A-8
CERTIFICATE OF PROBABLE CAUSE	A-9
MINUTES OF SEARCH AND SEIZURE HEARING IN NASSAU COUNTY COURT	A-10
MINUTES OF DECISION ON HEARINGS	A-100
PETITION FOR WRIT OF HABEAS CORPUS	A-122
EXCERPT FROM PETITIONER'S MEMORANDUM OF LAW	A-127
AFFIDAVIT IN RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS	A-131
EXCERPT FROM RESPONDENT'S MEMORANDUM OF LAW	A-133

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -

76 C 356

BOSSIE LEE HOLLAND,

Petitioner,

-against-

Memorandum of Decision and Order

COUNTY COURT OF NASSAU,

Respondent.

July 21, 1976

- - - - - - - - - - - - - - - - - - - -

MISHLER, CH. J.

Petitioner seeks a writ of habeas corpus pursuant to 28 U.S.C. §2254. Plaintiff was convicted after trial of burglary in the third degree, petit larceny, and possession of burglar's tools. He was sentenced to an indeterminate term of imprisonment with a maximum of four years on the former conviction, and definite terms of one year each on the latter convictions. Petitioner claims that his arrest was illegal, that the subsequent search of his automobile was illegal (the fruit of the illegal arrest), that the evidence seized should have been excluded from his trial, and that he is, therefore, in custody in violation of his fourth amendment right to be secure from unreasonable searches and seizures.

On December 5th and 9th, 1974, Judge Young of the Nassau County Court conducted a hearing to determine whether the seized evidence should be excluded from petitioner's trial. Judge Young made the following findings:

> [On April 9, 1974,] Detective Donahue of the Nassau County Police Department was advised to investigate the burglary of an office at 95A Nassau Road, Roosevelt, New York. He went to a rear apartment at that address where he encountered petitioner who produced a driver's license when asked for identification. The detective then requested that petitioner go with him to the First Precinct Stationhouse "for further investigation." Petitioner was taken to the Detective Squadroom, where he was advised of his "Miranda" rights and he refused to answer any questions. Petitioner was permitted to telephone an attorney from the stationhouse. The court found that Detective Donohue subsequently received a phone call from the complainant who advised him of the location of petitioner's car. It found that the detective asked for and received petitioner's permission to search the vehicle. From the trunk, Donohue seized a typewriter cover, and from on and under the front seat, he seized various tools, a mask and gloves.
>
> The court found that petitioner was "under arrest" when he first arrived at the stationhouse, but that he had voluntarily consented to the search of his automobile.

Holland's petition for a writ of habeas corpus, at 2-3.

Petitioner alleges that there was no probable cause to arrest him and that the alleged consent to search was the fruit of the illegal arrest. He further asserts that

the issues raised in the petition were raised in the New York State courts (petition at 3).

In a recent opinion deciding two companion cases, Stone v. Powell and Wolff v. Rice, 44 U.S.L.W. 5313 (U.S. July 6, 1976), the Supreme Court greatly limited federal habeas corpus relief to state prisoners who claim that evidence obtained from unconstitutional searches and seizures was wrongfully introduced at their trials.

In the first case (Stone), the respondent Powell (petitioner in district court) was arrested for violation of a vagrancy statute. A search incident to the arrest produced a revolver. Investigation revealed that the revolver had been used in a Claifornia murder. At trial, Powell contended that the vagrancy statute was unconstitutional, that his arrest was therefore illegal, that the search incident to the arrest was illegal (fruit of the poisonous tree), and that the revolver should, therefore, be excluded. The trial judge rejected these contentions and admitted the revolver. Powell was subsequently convicted. His conviction was affirmed by the appellate court and further appeal denied by the Supreme Court of California. He filed a petition for a writ of habeas corpus which was denied by a United States

District Court in California. On appeal, the Ninth Circuit Court of Appeals reversed. The Circuit Court held that the vagrancy statute was unconstitutional, that the arrest was, therefore, illegal, and that the evidence seized during the search incident to the arrest should have been excluded. The Court felt that such exclusion would deter legislators from enacting unconstitutional statutes.

In the second case (Wolff), police were investigating a bombing which killed a policeman. The police suspected certain members of a radical group. In search of suspects, police went to respondent Rice's (petitioner in the lower court) home. A search warrant was obtained, Rice's house searched, and dynamite, blasting caps and other materials seized. At his trial for murder, Rice moved to suppress the evidence. The trial court denied his motion and Rice was subsequently convicted. Holding that the search was valid, the Supreme Court of Nebraska affirmed. Rice then filed a federal writ of habeas corpus. The district court found the search warrant defective and granted the writ. The Eighth Circuit Court of Appeals affirmed.

The opinion delivered by Justice Powell traces the history of the federal writ of habeas corpus and of the

exclusionary rule which was judicially created to protect fourth amendment rights.

The Court noted that "primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights . . . . [T]he rule is not a personal constitutional right. It is not calculated to redress the injury to the privacy of the victim of the search and seizure . . . ." Stone v. Powell, supra, at 5319. The Court cites situations in which it has refused to apply the exclusionary rule because the need to preserve strong public interests outweighed the policy considerations behind the exclusionary rule. Id., at 5318-20. Using these situations as a springboard, the Court considered whether a fourth amendment claim by a state prisoner is cognizable on a federal petition for a writ of habeas corpus.

The Court noted that:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant . . . . Application of the rule thus deflects the truthfinding process and often frees the guilty.

Id. at 5320 (footnote omitted). The Court then balanced these costs against the benefits of the rule and determined that there are important "considerations [which] support the implementation of the exclusionary rule at trial and its enforcement on direct appeal of state court convictions. But the additional contribution, if any, of the consideration of search and seizure claims of state prisoners on collateral view is small in relation to the costs." Id. at 5321. The Court then concluded:

> that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Id.,(footnote omitted).

It is the court's finding that petitioner had a full and fair opportunity to litigate his fourth amendment claim in the New York State courts. In accord with Stone v. Powell, supra, Holland's petition for a writ of habeas corpus is denied, and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of respondent and against petitioner dismissing the petition.

U. S. D. J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

BOSSIE LEE HOLLAND :

Petitioner :

-against- : NOTICE OF APPEAL

COUNTY COURT OF NASSAU COUNTY : 76-C-356

Respondent :

- -x

S I R S :

Notice is hereby given that BOSSIE LEE HOLLAND, Petitioner, above named, hereby appeals to the United States Court of Appeals for the Second Circuit from an order dismissing his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2241, entered on July 21, 1976.

Yours etc.,

JAMES J. McDONOUGH
Attorney for Petitioner
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York 11501

DATED: Mineola, New York
July 23, 1976

TO: HON. DENIS DILLON
District Attorney
Nassau County

CLERK, UNITED STATES DISTRICT COURT
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -

76 C 356

BOSSIE LEE HOLLAND,

Petitioner,

-against-

Certificate of Probable Cause

COUNTY COURT OF NASSAU COUNTY,

Respondent.

July 30, 1976

- - - - - - - - - - - - - - - - - - - -

MISHLER, CH. J.

The application for a certificate of probable cause pursuant to 28 U.S.C. §2253 is granted. The court finds that a substantial issue for review is presented as to whether the state court afforded petitioner "an opportunity for full and fair litigation of [the] fourth amendment claim." Stone v. Powell, 44 U.S.L.W. 5313, 5321 (July 6, 1976).

Frank Mishler
U. S. D. J.

COUNTY COURT : NASSAU COUNTY
PART II

- x

THE PEOPLE OF THE STATE OF NEW YORK :

-against- : Ind. #39853

BOSSIE LEE HOLLAND, :

Defendant. :

- x

Mineola, New York
December 5, 1974

B e f o r e :

HON. DOUGLAS F. YOUNG, County Court Judge.

A p p e a r a n c e s :

ROGER HAUSCH, ESQ., Assistant District Attorney,
for the People.

ARTHUR V. GRASECK, JR., ESQ., for the Defendant.

- - -

MINUTES OF SEARCH AND SEIZURE HEARING

- - -

Reported by
Michael Yesner
Official Court Reporter

THE CLERK: People versus Bossie Lee Holland, Indictment Number 39863.

MR. HAUSCH: People call Detective Donohue.

D E T E C T I V E R O B E R T T . D O N O H U E , Shield Number 95, First Squad, Nassau County Police Department, New York, called as a witness by the People, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HAUSCH:

Q Detective, were you on a tour of duty with the Nassau County Police Department on April 8th, and April 9th, 1974?

A Yes, sir, I was.

Q And, would that be the late hours of the 8th, and the early morning hours of the 9th, and into the afternoon?

A It would be the 9 A. M. to 5 P. M. tour on April 9th, sir.

Q And did there come a time when you came in contact with someone later identified to you to be a Bossie Lee Holland?

A Yes, sir.

Q Do you see that individual in court?

A Yes, sir, that's Mr. Holland sitting right there with the blue shirt and the blue coat on, (indicating).

MR. HAUSCH: May the record indicate the identification, your Honor.

THE COURT: Yes.

Q Where and when did you first see Mr. Holland?

A I came in contact with Mr. Holland in an apartment at the rear of 95A Nassau Road in Roosevelt.

Q And did you have a conversation with him there?

A Yes, sir, I did.

Q And what was your conversation?

A I asked him for his identification, and at that time, he produced a driver's license. I told him that I was investigating a burglary, and at that time there was a female in the apartment. She was the person who was renting the apartment. Also, the complainant on the burglary was there. I asked Mr. Holland to accompany me to the First Precinct Stationhouse, that I wanted to talk to him further at that time.

Q And did he accompany you?

A Yes, sir, he did.

Q And about what time did you arrive at the First Precinct Stationhouse?

A Oh, I would say we got there, I would say approximately ten minutes to two at the latest, right around in there.

Q And did you take Mr. Holland to any specific place?

A Yes, sir, the detective squad room upstairs.

Q And did you have any conversation with him there?

A Yes, sir, I did.

Q And what, if anything, did you tell him?

A I told him he had the right to remain silent, that anything he did say could be used against him in a court of law, that he had a right to an attorney, that if he could not afford an attorney, one would be provided for him, and that during this period of time he had the right to remain silent.

Q And, after you told him this, did the defendant say anything?

A Pardon, sir?

Q Did the defendant, Mr. Holland, say anything?

A Yes, he said, at that time, he refused to answer any further questions.

Q Did you ask him any questions?

A Approximately five minutes later, yes, sir, I did, sir.

Q And what did you ask him?

A I asked him if I could have permission to search his car.

Q And what did he say?

A He says, "Yes, sir, sure, go ahead. There is nothing there".

Q And did he do anything, at that time?

A Yes, sir, he gave me the keys to his automobile.

Q And did you in fact, go to the automobile in question?

A Yes, sir, I did.

Q And would you describe that vehicle?

A It was a 1965 Chevrolet, color black, and it was located approximately 100 feet west of Nassau Road on Taylor Avenue in Roosevelt.

Q And what first led you to believe that the defendant's car was there?

A I had received a call from the complainants in the original burglary case, a Mr. Nelson, stating that he had seen the car at that location.

Q And about what time did you receive that call?

A I received that call, I would say, maybe five minutes after two. It was only a few minutes after we had gotten into the stationhouse and after I had advised Mr. Holland of his rights.

Q Was that before you asked Mr. Holland if you could search the vehicle?

A What was this, sir?

Q Did you receive this information before you asked

Mr. Holland if you could search the vehicle?

A Yes, sir. I didn't know where the vehicle was until at the time that I received the call.

Q And you indicated Mr. Holland said yes, and that he gave you the keys?

A Yes.

Q And did you respond to that location?

A Yes, sir, I did.

Q And what, if anything, did you have done there?

A Mr. Nelson, the complainant, was waiting there for me when I arrived.

Q Did you bring Mr. Holland with you?

A No, sir, I did not.

Q And what did you do upon arriving there?

A I took the keys, opened the trunk, and in the trunk I found an Olympia typewriter cover in the trunk of the auto.

Q Do you have a photograph of that cover with you?

A Yes, sir, I do.

MR. HAUSCH: May I have that marked for identification, your Honor.

THE COURT: Yes.

(Above referred to item marked as People's Exhibit 1, for identification.)

MR. HAUSCH: Show it to the witness, please.

Q Is that a fair and accurate representation of the typewriter cover as it appeared?

A Yes, sir, it is.

MR. HAUSCH: I offer it in evidence, your Honor.

MR. GRASECK: I have no objection to it being offered for the hearing.

THE COURT: All right. We'll mark it.

(People's Exhibit 1, for identification, now marked as People's Exhibit 1, in evidence.)

Q Did you have to do anything else in the car?

A Yes, sir, I did.

Q And where and what did you have to do?

A On the front seat of the auto I found two screwdrivers, a flashlight, and a pair of gloves, two large sets of keys, and under the driver's -- under the front seat, the one just directly under the steering wheel would be a single lug wrench with a pry bar end and one lug end that would fit a tire, like a small tire iron, just a one ended tire iron, and there was also a mask with eye slits cut in it, and on the right-hand side under what would be the passenger's side, there were a large pair of bolt cutters. It was half sticking out from under the front seat.

Q Now, as you stood outside of the vehicle before you opened the door, were you able to notice any of this

material?

A The items on the front seat, yes, sir, they were clearly visible.

Q How about the bolt cutter?

A It was partially visible, but I didn't take notice until I actually leaned into the car.

Q And upon finding these items, what did you do?

A I took all of the items back into the First Precinct Stationhouse.

Q And did you cause them to be photographed?

A Yes, sir, I did.

Q Do you have that photograph with you?

A Yes, sir, I do.

MR. HAUSCH: May I have that marked for identification, your Honor.

THE COURT: Yes, mark it for identification.

(Above referred to item marked as People's Exhibit 2, for identification.)

MR. HAUSCH: Would you show that to the witness, please.

Q Is that a fair and accurate representation of the items you found in the vehicle?

A Yes, sir, it is.

MR. HAUSCH: I offer it in evidence, your Honor.

MR. GRASECK: I have no objection for the hearing.

(People's Exhibit 2, for identification, now marked as People's Exhibit 2, in evidence.)

Q Detective, did there come a time when you came in contact with Arthur T. Vassallo, the witness who just finished testifying?

A Yes, sir, there did.

Q And did you receive certain property from Mr. Vassallo?

A Yes, sir, I did.

Q What was the nature of that?

MR. GRASECK: Objection. I think this is beyond the scope of the hearing. I assume this question -- the hearing relates to the legality of the search and not to anything that may have occurred subsequent to it.

MR. HAUSCH: Well, your Honor, my purpose is to offer photographs of the typewriter alleged to have been the fruits of the burglary. I hope to establish through this witness that he did, in fact, get the typewriter from Arthur Vassallo, and that the defendant would not have standing to challenge that property when it is offered at the trial.

THE COURT: All right. I will take it.

Q And what was the nature of the property you

retrieved from Mr. Vassallo?

A There were two typewriters, an Olympic typewriter, which was the one stolen in the burglary, and there was a Sears and Roebuck typewriter.

Q And do you have a picture of the Olympic typewriter with you?

A Yes, sir, I do.

MR. HAUSCH: Can I have that marked, your Honor?

THE COURT: Mark it for identification.

(Above referred to item marked as People's Exhibit 3, for identification.)

Q Sir, would you look at the photograph, and I ask you is that a fair and accurate copy of the way the typewriter appeared when you saw it?

A Yes, sir, it is.

MR. HAUSCH: Offer it in evidence, your Honor.

MR. GRASECK: No objection for the hearing.

THE COURT: Marked in evidence.

(People's Exhibit 3, for identification, now marked as People's Exhibit 3, in evidence.)

Q Detective Donohue, when you spoke to Mr. Nelson on the phone with reference to the defendant's vehicle--

A Right.

Q Could you tell me to the best of your recollection,

what was said by you and what was said by him?

A Mr. Nelson said that he had found the vehicle on Taylor Avenue, and that he believed his typewriter may be in the vehicle.

Q I see. And did he call you or did you call him?

A No, He called me, sir.

Q And did you have further conversation with Mr. Nelson when you arrived at the vehicle?

A Yes, sir, I did.

Q And, to the best of your recollection, what did you say and what did he say?

A I told him I had received permission from Mr. Holland to search the vehicle, and I proceeded to search the vehicle, and he stayed there and watched me.

MR. HAUSCH: You may inquire.

THE COURT: I don't think we had any time established, did we, when he made his contact with Mr. Vassallo?

MR. HAUSCH: I thought I had, your Honor, but I may be mistaken.

Q What time did you see Mr. Vassallo for the first time?

A The first time I saw Mr. Vassallo was after I had searched the vehicle, I put the items I had obtained from the search in the trunk of the vehicle, and then I had

obtained information from Mr. Nelson also, at that time, that his article, since it wasn't in the car, may have been taken to the Highway Inn for sale by the subject. So I came in contact with Mr. Vassallo, I would say, at least 2:40, in the afternoon of that day.

Q And, that would have been at the Highway Inn located at 482 Nassau Road in Roosevelt?

A That's correct.

MR. HAUSCH: Thank you.

CROSS EXAMINATION

BY MR. GRASECK:

Q Detective Donohue, is it?

A Yes, sir.

Q What was the time that you first took Mr. Holland into custody, if you recall?

A That was approximately 20 minutes to 2, somewhere around in there.

Q Was he under arrest at that point?

A No, sir, he was not.

Q Was he free to leave?

A No, sir, he was not.

Q When did you have this discussion with him about the keys?

A About the keys to his auto?

Q Right.

A That was after we were in the First Precinct Stationhouse.

Q Could you state what time it might have been?

A It was approximately five minutes after two.

Q And could you state what transpired in that 25 minute period?

A What 25 minute period is this from, sir, from when to when?

Q From 1:40 until 2:05?

A At 1:40, Mr. Holland accompanied me into the First Precinct Stationhouse. We went upstairs to the detective room. I signed him at the blotter, I advised him of his rights, at that time. He said he refused to speak to me. At that time, I had a phone call from Mr. Nelson, almost immediately after I advised him of his rights, and Mr. Nelson was telling me that his car was parked at this location, and that's when I asked him if I could search his vehicle.

Q Was there any further discussion about his rights, or did he indicate in any way? Was there any further discussion about his rights? Did he indicate to you in what way, if at all, he wanted to put them to use?

A When I had first advised him, he said he didn't want

to say anything more at that time, and then a few seconds after that I had received a phone call, which is right after he had told me that he didn't want to speak anymore. I had received a phone call, and then I asked him if I could search his vehicle.

Q Did you have any conversation with him about telephone calls that he might want to make?

A At that time, no, sir, I did not.

Q Were you with him continuously during this period until you had the discussion about the keys?

A No, sir, I wasn't. After I had advised him of his rights and I received the phone call, I talked to Mr. Nelson in another room. After I spoke to Mr. Nelson, I came back into that room where Mr. Holland was.

Q And was he alone with other detectives during that period?

A I believe there must have been another detective in the room, otherwise we wouldn't have left him there.

Q So, you have no knowledge as to what may have transpired between him and that other detective during that period?

A The most he could have been in there was one minute, sir.

Q Did there come a time that Mr. Holland was hand-

cuffed?

A Yes, sir, there was.

Q At what point did that occur?

A I believe Mr. Holland was taken from the First Precinct Stationhouse to Police Headquarters in Mineola.

Q This was some time after the search that you described, is that correct?

A This was way after he was placed under arrest, sir.

Q And, again, it would have been after the search, right?

A Oh, yes, sir.

Q When you took him into custody, did you take any precautions to assure that he wasn't armed?

A I was with him at all times, sir, yes.

Q Well, was there any pat down search?

A No, sir, there was not.

Q Was there ever a time that the contents of his pockets were removed?

A Yes, sir, there would have been.

Q And could you indicate when that was?

A That must have been some time much later in the afternoon. I believe I had left the office at approximately 5 o'clock that night, and at the end of processing after the arrest cards are done, then the prisoner's property is

taken, and I assume that the rest of his property was taken off him at that time, and placed in a property envelope.

THE COURT: You are saying that you didn't process him?

THE WITNESS: No, sir, I did not.

THE COURT: And up to the point that you left, he hadn't been processed, is that correct?

THE WITNESS: That's correct, sir.

Q You took him into custody as a burglary suspect, isn't that your testimony?

A That's correct, sir.

Q And from the time you took him into custody at least until the time you conducted this search, he was under guard, was he?

MR. HAUSCH: I would object to the form of the question, your Honor.

THE COURT: Sustained.

Q There was a detective with him throughout this period, isn't that true?

A Yes, sir.

Q And that was either you or someone or more other detectives?

A Yes, sir.

Q Where had the key been that you obtained possession

of immediately before you got it?

A The key to his car?

Q Right.

A That was on a key ring that was in his possession.

Q Where was the key ring?

A I don't recall whether it was in his jacket or where he took it from.

Q Is it possible that it was on the table, at that time?

A I don't recall, sir.

Q Now, you stated you found the typewriter cover that's depicted in this picture. Is there any way that you can identify this as a picture of the typewriter cover that you found?

A It has the complainant's initials on the rear of the photograph, sir.

Q If that were absent, would you be able to state that this is the same typewriter cover that you located?

A I could, sir, because I took the photo.

Q Well, what would you rely on in making that determination, the way that it's folded or wrinkled?

MR. HAUSCH: Objection.

THE COURT: Sustained.

Q There is nothing, is there, about this typewriter

cover that is distinctive?

MR. HAUSCH: Objection.

THE COURT: Sustained.

Q Now, your testimony to the effect that the typewriter had been -- the one that was lost or complained of having been lost in a burglary, what do you base that on?

A The information I received from the complainant in the case.

Q Do you know this to be the same typewriter that had been missing at Nelson's Plumbers?

A Yes, sir, I do.

Q How do you know that?

MR. HAUSCH: Objection.

THE COURT: Why?

MR. HAUSCH: Your Honor, I think we are going beyond the purview of the search and seizure hearing, at this time. I established, I believe, that the defendant has no standing to challenge the offer of the photograph of the typewriter, and I think questions along this line go beyond the scope of what this hearing is to determine.

THE COURT: Overruled.

Q How do you know this to be the typewriter that was lost in the alleged burglary?

A I took a photo of it again, sir. That was the typewriter I received from Mr. Vassallo, and I identified it by serial numbers on the typewriter.

Q There is a serial number on this typewriter?

A There certainly is.

Q And Mr. Nelson had knowledge of the serial number of the typewriter that he lost?

THE COURT: Counsel, it seems to me that the identity or the identification of these objects is not the issue here. It is whether they are admissible, whether they were obtained constitutionally.

MR. GRASECK: Well, that's what I felt, but then it seemed to me that the hearing had been broadened to extend to the question of the relevancy of these items and whether we could question their admissibility in evidence for reasons other than the basis that the search might have been unlawful.

MR. HAUSCH: Your Honor, I think our effort was to establish that, for one thing, this typewriter was not the result of any search involving this defendant.

MR. GRASECK: All right.

Q Now, you testified that when you went up to this car there were certain articles you could see and did see before you made your search, is that right?

A No, that's not correct, sir. I did search the trunk first before I looked into the inside of the vehicle.

Q What did you have to do in the trunk?

A I found the typewriter cover in the trunk.

Q And thereafter you walked to the front seat?

A I walked to the front of the vehicle, the driver's side of the vehicle, yes, sir.

Q And it is your testimony that before you opened the door, you observed something?

A Yes, sir. I could see the flashlight, the key rings. There were numerous keys on each ring. There was a pair of gloves, a flashlight, two screw drivers.

Q And thereafter, after you entered the car, you found the bolt cutter, is that correct?

A The bolt cutters, the tire iron and the mask.

Q Where did you discover the mask?

A That was under the fronthand seat, the driver's side.

Q When you advised Mr. Holland of his rights, was there any conversation about his communicating with a lawyer?

A No, sir, there wasn't. I asked him -- I advised him of his right to an attorney, and if he could not afford one, that one would be provided for him.

Q He stated that he did not wish to make any statement, is that right?

A Yes, sir. He said he had nothing further to say.

Q Was there a time that you saw him driving in his car?

A I have seen him quite some time after Mr. Holland was arrested driving in his auto, yes.

Q But never on or about the time of his arrest?

A No, sir.

Q Well, in connection -- did you read his rights from a card?

A No, sir, I just gave them verbally, just as I stated them before.

Q And among the things you said to him was, "Do you wish to waive these rights"?

A No, sir, I did not say that.

Q Well, could you state again--

THE COURT: What will that help us with in this hearing. This is a search and seizure rather than a Miranda Hearing.

MR. GRASECK: Right, but there is a question in my mind whether the inquiry that was made subsequent to the advising of the rights was inconsistent with the assertion of the rights.

THE COURT: Do you mean he was asked a question about searching the car. Is that what you mean?

MR. GRASECK: Yes.

THE COURT: Well, I don't see that the specification of the rights again is going to help us.

Q Did you tell the defendant that anything he said could and would be used against him?

A Yes, sir, I did.

Q And, after you completed advising him of his rights, he said that he wished to make no statement, is that correct?

A That's correct.

Q Do you have any recollection of where you obtained the keys from?

A From Mr. Holland himself.

Q You stated they were on a key ring?

A I believe so, yes.

Q Did he give you the key ring?

A Yes, sir, he did. He pointed out the key on the ring.

Q Now, I understood you to testify that this typewriter cover that you found related to the typewriter, the picture of which is in evidence for this hearing?

THE COURT: Well, the only testimony was that it was an Olympia typewriter cover, I think.

Q You don't have any knowledge, do you, as to whether that cover was from that typewriter?

MR. HAUSCH: Objection.

THE COURT: Sustained.

MR. GRASECK: I have no further questions.

MR. HAUSCH: I have a brief redirect, your Honor.

REDIRECT EXAMINATION

BY MR. HAUSCH:

Q Detective Donohue, prior to the defendant giving you the keys, did he at any time ask to see a lawyer or indicate he wanted to see a lawyer?

A No, sir, he did not.

Q Did he ask to make any phone calls?

A No, sir, he did not.

MR. HAUSCH: Thank you.

THE COURT: Anything further?

MR. GRASECK: No, no questions, your Honor.

THE COURT: You may stand down.

MR. HAUSCH: The People rest, your Honor.

MR. GRASECK: May we have a brief recess, your Honor. I want to discuss this with the defendant.

THE COURT: Yes.

(Recess.)

(After recess.)

THE CLERK: People versus Bossie Lee Holland.

Hearing continued.

MR. GRASECK: The defendant would like to take the

stand, your Honor.

THE COURT: All right.

B O S S I E L E E H O L L A N D , residing at 46 Ash Street, Central Islip, New York, called as a witness on behalf of himself, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRASECK:

Q Mr. Holland, do you recall the events of April 9th?

A Yes, sir.

Q Did there come a time that you had a conversation with Detective Donohue?

A Yes, sir.

Q And can you state the circumstances of that conversation, when you first had a conversation with him on that date?

A Yes, sir, it was at -- I don't recall the number, but Nassau Road, Mrs. Cowart's house. Her and her husband lived in back of a shop called Nelson Plumbers. They had an apartment in the rear, and I went there to see them, and when I got there, Detective Donohue and Mr. Nelson walked in right behind me, and Detective Donohue asked me for identification, and I gave him my driving license, and I asked him what's wrong. He said that I was a suspect

in a burglary, and Mr. Nelson jumped up and -- shall I use the words?

THE COURT: Yes.

A Mr. Nelson jumped up in my face and says, "Nobody steals my fucking property." Well, I says, "Listen, don't you be jumping up in my face making statements like that. I don't know what you're talking about. " So, him and I argued for a second and Detective Donohue got between us and said, "You're under arrest, all right". I says, "Well, I didn't know that." And he asked Mrs. Cowart if he could use her phone to call a patrol car. He said that he was by hisself. Mrs. Cowart gave him permission to use it, and about I guess five or ten minutes later, a patrol car came up, and the four of us walked outside. They put me in the patrol car. Detective Donohue says, "Escort this man to the First Precinct. I will follow you." So I went to the First Precinct.

Q Do you have a recollection of the time of this initial contact with Detective Donohue?

A I think it was -- I am quite sure it was about five to two, a quarter to two, somewhere in that category.

Q What happened when you arrived at the Precinct?

A Detective Donohue took me upstairs, and when we got up to the second floor, I asked him, I said, "Sir, if I

am under arrest, I would like to make a phone call", and he went and dialed a number -- asked me who I wanted to dial, rather. I said, "Call Mr. John Sutter." I said, "I know him for a couple of years." So, he dialed Mr. John Sutter's number, and I got Mr. John Sutter on the telephone, and I talked to Mr. Sutter and told him what was happening and where I was after his secretary, of course, put him on, and he advised me, and we hung up.

Q What happened then?

A Detective Donohue took me into another room and asked me to empty my pockets, and he got a form out, and he started asking me questions, and he took out his camera, and he took a picture of me, and he asked me to sign this form after he had asked me questions, which I didn't.

THE COURT: You didn't sign the form?

THE WITNESS: No, sir, I didn't. He made a statement to me that he would like to know who the fences are.

MR. HAUSCH: I'm sorry, I didn't get that.

THE COURT: "I would like to know who the fences are."

A And he said he knew about Mr. Vassallo at the Highway Inn, and he said, "Cooperate with us and I will see that you get probation", and I told him, "I'm not making a statement, and I'm not signing anything."

Q Do you know what was on this form that you referred

to?

A Yes, it was questions. I read it. In fact, I had asked him if I could read it. He let me read it. On there were some questions about family, if you are married, children, where you work, and number 6, I saw, said, "Defendant loitered outside premises". Well, naturally, I looked at that, and I said, "Gentlemen, I didn't do this, and I am not going to sign it", and then I gave it back to him.

Q Now, you say that at this point -- what is it that you put on the table at his direction?

A I put my wallet, my I. D. card, my change and my car keys and papers that I had because a lot of detectives came in and started going through all of my stuff. As each one came in, they went through my personal things, and he took my picture also, at that time.

Q Did there come a time when you were advised of your rights?

A Never, never.

Q Well, do you mean never by the detective, never by any of the police?

A Never by a detective, never by anyone in that squad room.

Q Well, did there come a time when your keys were no

longer on the desk?

A Yes.

Q Can you explain how that came about?

A Yes. Detective Donohue asked me about what I said about fences and things, and I said, "I wasn't signing anything, and I wasn't making any statement". He said, "Well, we will do it the hard way. I will go out and get statements." I said, "Well, you will have to go right ahead." So, after he had finished everything, taken my picture and all, he says, "I want your car keys". I said, "Well, why are you searching my car now? Why didn't you search my car while I was there?" I says, "I am not going to be there when you search my car." He said someone will be there. I said, "Who, another detective?" He said, "No, a civilian."

So how can I argue with the man. So he took me out in the anteroom, and there was another detective there and a woman, and he asked them to watch me. They put me in a chair, and he left, and before he left I walked up to him, and I said, "Detective Donohue," I says, "do you mean to say you are going to go out and get statements on me like this without me being there to defend myself?" He says, "Yes", and so he left.

Q Well, how did -- I'm not sure that -- maybe I didn't

hear something, but did the keys at some point leave the table or the desk?

A He took my keys with him when he left.

Q Could you estimate the length of time that you were with Detective Donohue before he took the keys?

A I think I was there with him the time he was questioning me and everything, I would say about a good hour. I think it was a good hour, an hour and a half.

Q What conversation did you have during this period about Mr. Vassallo?

A He's the one that made the statement about Mr. Vassallo. He made the statement. He says, "We know about the Highway Inn, and Mr. Vassallo." That you will see that was said. He made that statement there.

Q Were other people present when you were with Detective Donohue at the Precinct?

A Only when we first came in, only when we went upstairs in that big room, and when some detectives came in and out of the room where him and I was, but I would say the first 15, 20 minutes it was just him and I in there.

Q Who were you with at the time that you made this telephone call?

A Detective Donohue was there and there was another detective and a young lady in the room, but I don't know

who they are.

Q You stated, did you not, that the detective indicated he wanted information about others?

A Yes, sir.

Q And what did he indicate? Did he give you any reason to give information about others?

A Yes, he said he wanted to know about fences. That's what he was interested in, and that he could see that I get probation, and I told him I wasn't making a statement, and I wasn't signing anything.

Q Did he describe Mr. Vassallo as a fence?

A All he said was, "We know about the Highway Inn, and Mr. Vassallo". That was his statement.

Q How long after he left with your keys did he return?

A I think Detective Donohue was gone a good two hours. I would say a good two hours he was gone.

Q And what happened on his return?

A On his return he came in, and he says, "Now you are under arrest". He took his handcuffs and he handcuffs me to the desk. He brought in a cover with tools laying inside of it, and then he went out of the room, and he came back in with two typewriters, which he laid on the desk.

Q Did he have anything else with him at that point?

A My tools that he claimed that he took out of my car,

and the typewriters. Those are the only things that I saw.

Q Do you have a recollection of what your conversation with Mr. Sutter consisted of?

A Yes, I told Mr. Sutter, I says, "It's Bossie Holland," and he says, "Yes". I says, "I'm over at the First Precinct. I have been arrested." He asked me why, and I told him, and he says, "Well, we will see if we can get someone to get over to the headquarters." When I get over there to be booked, he figured -- I think he said -- what do they call it -- they would have a Judge to sign something, a paper, so I could get out on a bond or something. I don't know how he meant it. He said he would call me back, which he did.

Q Did he give you any advice?

A Yes. He told me to be sure and sign nothing but my property and my fingerprint card.

MR. GRASECK: I have no further questions.

CROSS EXAMINATION

BY MR. HAUSCH:

Q Now, Mr. Holland, you indicated that you expressed a desire to call Mr. Sutter?

A I asked, yes.

Q Was that after Detective Donohue gave you your rights?

A Detective Donohue never gave me any rights, sir.

Q You understood what your rights were?

A They wasn't told to me, sir.

Q But, did you know what they were?

A But they wasn't told to me, sir.

Q That's not my question. Did you know what your rights were?

A Unless they are told to me.

THE COURT: Are you saying you didn't know or you did know?

MR. GRASECK: Objection, your Honor. I think the question is irrelevant.

THE COURT: Overruled.

Q Would you answer the question, Mr. Holland?

A Well, it's the way you are putting the question, sir. Now, this gentleman, if this gentleman didn't explain my rights to me, how would I know what they were?

Q Mr. Holland, this wasn't your first involvement with the law, is it?

A No, sir, it's not.

Q You have been advised of your rights on previous occasions, haven't you?

A Twenty-five years ago.

Q That was the last time you were advised of your rights?

A No, 1970.

Q And you were told your rights then?

A Yes, sir.

Q What were you told back in 1970? What did they tell you, at that time?

THE COURT: I don't want to go into that.

MR. GRASECK: Objection, your Honor.

Q At any rate, you claim that you did demand to make a telephone call?

A I asked if I could make a phone call.

Q And who did you ask?

A Detective Donohue.

Q And did you in fact, make that phone call?

A He made it for me.

Q He dialed the number?

A Yes.

Q And what happened after he dialed the number?

A Mr. Sutter, I got Mr. Sutter on the phone, and I told him where I was.

Q Detective Donohue gave you the phone, and you spoke to Mr. Sutter?

A Yes, sir.

Q And was this when Mr. Sutter told you not to sign anything?

A On the second phone call his associate lawyer told me that.

Q I'm sorry, I didn't hear the answer.

THE COURT: On the second phone call his associate lawyer told him that.

MR. HAUSCH: I see.

Q After you finished your initial conversation with Mr. Sutter, did you hang up the phone?

A Detective Donohue took the phone back and hung it up.

Q You gave it back to Detective Donohue, and he hung it up?

A Yes.

Q Did you have any conversation with Detective Donohue, at that time?

A He took me into the squad room.

Q And, did you have any conversation?

A Yes, sir.

Q What was that conversation?

A He asked me questions about if I was married, and where I worked, children, family questions.

Q And did you respond to those questions?

A Yes, I did.

Q And any further conversation, at that time?

A Yes. He said that -- excuse me -- he was interested

in fences, he was more interested in fences, and he said he knew about the Highway Inn, and Mr. Vassallo, and he said that he could help me get probation, things like that, and I told him that I was not going to sign anything or making any statements, and he asked me to sign the form that he had finished typing out, and I asked him could I read it, and he said, "Of course." So, I took the form and I read it, and I didn't sign it.

Q Now, you say he asked you to say something about fences?

A He said he was interested in fences.

Q And you did not answer him, or you did not tell him anything about fences?

A I said I wasn't making any statement or signing anything.

Q I see. Now, you indicated that there was a time when Detective Donohue asked you for your car keys?

A Yes, sir.

Q And about what time was that?

A I would say about an hour or an hour and a half after we was there.

Q And you gave him your car keys?

A No, he took my car keys.

Q Did you indicate those were your car keys?

A Yes. They were on the desk.

Q And after you so indicated, you saw him remove the keys from the desk?

A He took my car keys.

Q Well, where did he take them from?

A He got them off the desk.

Q He picked them up with his hand?

A I guess so.

Q Did he?

A He had to.

Q Well, did you see him?

A Yes, he took my keys.

Q And he left you, at that time?

A He took me into the anteroom, the big room where a detective was and another lady was, and he asked them to keep an eye on me, that he was leaving.

Q And at what time was that?

A A good hour or hour and a half after we got there, and we got there, I guess about five or ten to two.

Q So you say it would be about ten to three?

A I would say more like close to 3:30, 3:15, 3:30, when he left.

Q And you said Detective Donohue came back with some tools he took out of your car?

A Yes, sir.

Q And where were you when you first saw those tools?

A I was sitting with my back to the door, and he passed by me.

Q Was this in that anteroom that you described?

A No, this was in the squad room. As he came in, they brought me back into the squad room.

Q And what did Detective Donohue do with your tools?

A He laid everything on top of a desk.

Q And could you see what was laying on top of the desk?

A Yes. He put it right in front of me to my right.

Q Do you recall what was there?

A Yes, it was my personal tools out of my car, my screw driver, my flashlight, my gloves, my mask, my old Halloween mask, and some small wrenches I think I had, and my keys.

Q All right. You had a couple of sets of keys?

A Yes, I have sets of keys.

Q And a bolt cutter?

A And I had a bolt cutter, yes, sir.

Q Did you have a conversation with him about these tools?

A He says, "Now you are under arrest", and then he walked out, and he came back in with the typewriters.

Q Did you have any conversations about the typewriters?

A He said I was under arrest.

Q All right. Well, did he ask you anything specifically about the typewriters?

A No.

Q What time did you indicate to Mr.--

What time did you indicate that Mr. Sutter's associate called you back?

A Maybe about 5, I guess, I think.

Q 5 P. M.?

A I think, but I'm not sure. I'm not too sure.

Q And you had this conversation about possible bail, or something of this nature?

A Yes, I did.

Q That was the nature of the conversation in total?

A And he was trying to get a Judge over to the jail.

Q And at that point, he told you not to sign any papers?

A I was advised not to sign anything but my finger-print card and my property.

Q And you didn't, did you?

A No, I did not.

Q Where did you receive that call at about 5 P. M.?

A Where did I receive it?

Q Yes.

A They called me in -- let's see, which room now, if I can remember. I think Detective Donohue gave it to me from his office in there. The phone on my left. I think that's where he put me on. In fact, I am quite sure it was.

Q And, after your conversation, did you hang up your phone or did Detective Donohue?

A I was handcuffed, and the phone was on the left. Just give me a moment. But I could reach practically over there. I think he hung it up, yes. I think I handed it back to him.

Q You quoted Mr. Nelson stating when you first met him that something to the effect of, "Don't steal my fucking property"?

A This is the 9th you are talking about, is that correct?

Q Yes.

A Yes, sir.

THE COURT: We haven't been talking about any different date than the 9th have we?

MR. HAUSCH: No, your Honor.

Q Did you respond to Mr. Nelson?

A Yes, I did.

Q And to the best of your recollection, what did you say?

A "I don't know what you are talking about".

Q And later on the 9th, you did talk to Arthur Vassallo, the gentleman that testified before?

A You said later on in the night?

MR. HAUSCH: Withdrawn.

Q Did there come a time when you spoke to Mr. Vassallo?

MR. GRASECK: Objection. I don't believe that to be relevant to the legality of this search, your Honor.

THE COURT: Sustained.

Q Sir, you weren't watching your watch or a clock continuously during this period, were you?

A There was a clock in the room, I think, if I remember correctly.

Q You weren't just watching the clock, were you?

A No, sir.

Q If I told you that the police blotter reflected that you were at the First Precinct at 1358, being 1:58 P. M., would that be a -- would that refresh your recollection?

A I said about 1:50 or a quarter to two or something like that. I wasn't sure.

Q And if I told you that the blotter reflected that Detective Donohue signed out to go to Roosevelt at 1415,

which would be 2:15 P. M., would that refresh your recollection?

A That's about an hour, yes, an hour, an hour and a half.

THE COURT: I am about to recess for the day, Mr. Hausch.

MR. HAUSCH: I'm almost finished, your Honor.

Q Sir, have you ever been convicted of a crime?

MR. GRASECK: Objection, your Honor. I don't think that's an appropriate question. I believe that if this is being offered for the purpose of impeaching the witness' credibility, that we are entitled to a conference as to whether it is recent enough or whether it bears on moral turpitude in such a way as to be a proper question for cross examination.

THE COURT: Well, of course, that application should be made before we start. Does anybody have a rap sheet? I will look at it.

THE CLERK: I have one, your Honor, (handing).

THE COURT: There appears to be two convictions on this, one in 1946 and one in 1949. I think they are out of date now.

MR. HAUSCH: Yes, your Honor. I believe there are more recent charges.

THE COURT: You understand, of course, that the

trier of the facts, which is myself, is looking at the rap sheet in order to answer your question, and so in effect, I am finding out about them.

MR. GRASECK: I know, your Honor, but it is an issue that we have to resolve at some point before a jury trial, in any event.

MR. HAUSCH: Your Honor, I thought I had my F. B. I. check, which is more recent. I have ordered a current report to be supplied. I should receive it tomorrow morning. With the exception of that, your Honor, the People would have nothing more to add to the record.

MR. GRASECK: Your Honor, I just have to object to the asking of the question because as the Court points out, the mere asking of the question and the display of the rap sheet, which includes a matter that was dismissed, must have some subliminal -- or, rather, it could have possibly an effect on the atmosphere in the courtroom.

THE COURT: Well, I think you would have to assume, as has been done in other situations, that where matters are being tried before a Judge without a jury, that the Judge is capable of eliminating prejudicial or improper material from his considerations, and so I would hold that that would apply here.

MR. HAUSCH: Your Honor--

THE COURT: We will take the question up before we actually go to trial.

MR. HAUSCH: Yes, your Honor.

Your Honor, I do have an additional partial sheet.

THE COURT: Well, it would be better to have the entire sheet, wouldn't it?

MR. HAUSCH: All right.

MR. GRASECK: This looks like a pending matter.

THE COURT: Well, then we will recess until tomorrow morning.

MR. HAUSCH: Fine, your Honor.

THE COURT: All right.

THE CLERK: He's in his own custody.

THE COURT: The defendant is continued in his own custody.

THE DEFENDANT: Thank you, your Honor.

(Whereupon, the above trial was adjourned.)

- - -

COUNTY COURT : NASSAU COUNTY
PART II

- x

THE PEOPLE OF THE STATE OF NEW YORK :

-against- : Ind. #39863

BOSSIE LEE HOLLAND, :

Defendant. :

- x

Mineola, New York
December 6, 1974

B e f o r e :

HON. DOUGLAS F. YOUNG, County Court Judge.

A p p e a r a n c e s :

(As heretofore mentioned.)

- - -

MINUTES OF SEARCH AND SEIZURE HEARING

- - -

THE CLERK: People versus Bossie Lee Holland, Indictment Number 39863.

Hearing continued.

People ready?

MR. HAUSCH: People ready, your Honor.

THE CLERK: Defendant ready?

MR. GRASECK: Yes.

MR. HAUSCH: Your Honor, the People would make an application to call a witness to put in certain blotter entries pursuant to our discussion off the record.

THE COURT: Any objection?

MR. GRASECK: No, your Honor.

THE COURT: I will permit the People to reopen and call a witness.

MR. HAUSCH: Thank you, your Honor.

Sergeant Adamo.

S E R G E A N T J O H N A D A M O , Shield Number 3, Records Bureau, Nassau County Police Department, New York, called as a witness by the People, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HAUSCH:

Q Sergeant Adamo, are you assigned to the Records Department of the Nassau County Police Department?

A Yes, sir.

Q And, are the Police Precinct blotters kept by your office in the ordinary course of business?

A Yes, sir.

Q And, at my request, did you make a photostatic copy of entries of April 9th, the time being 1357, 1:57 P. M.?

A Yes, I did.

Q And do you have that record with you?

A Yes, I do.

Q And is that a fair and accurate copy of the original blotter?

A Yes, it is.

MR. HAUSCH: I would offer that in evidence, your Honor.

THE COURT: Show it to counsel, please.

MR. GRASECK: Well, your Honor, I have no objection to this document being offered in evidence, but this includes two notations that appear to be relevant to this case, one is 1342, and the other is 1357. There was, however, also testimony of subsequent times, I believe, your Honor, such as 1415, and I would urge that the complete series of records--

THE COURT: What does the 1415 time have reference to?

MR. GRASECK: It was my recollection that that was the police officer's testimony as to when he left to conduct the search, and I didn't recall him asserting that he was relying on a record such as this in setting that time forth. So, I would simply urge that the complete record for the remaining times of that day be also submitted.

THE COURT: Can you get that, Mr. Hausch?

MR. HAUSCH: Your Honor, I am informed it may be in another record book, the squad log. I can obtain the additional copies and a copy of the squad log, I believe by this afternoon. I would ask--

THE COURT: Would that be from the same central records bureau?

MR. HAUSCH: The squad log would come from the First Squad, I am informed, and it is kept in that location.

THE COURT: Well, why would they be in different books when they are so close in time?

Q Sergeant, could you indicate that?

A Yes, the Precincts, when they complete their blotter, they send them to the Records Bureau to be stored, and the squad usually keeps them there a lot longer. I don't know why.

THE COURT: You are saying, when you say, "By the Precinct", do you mean by the detectives?

THE WITNESS: No, the uniformed force.

THE COURT: And, "By the squad", you mean the detectives?

THE WITNESS: That's right.

THE COURT: So, you are saying they are kept as

two separate sets of records?

THE WITNESS: That's right.

THE COURT: And what do we have here?

MR. HAUSCH: We have the Precinct blotter entry as to when the defendant was first brought into the First Precinct.

THE COURT: But, then the exits and entries of a detective without a defendant, or without his being accompanied by a suspect, would be in the detective's log?

MR. HAUSCH: I believe that is correct, your Honor.

THE COURT: And where is that kept?

MR. HAUSCH: As far as I know, your Honor, that is kept in the squad. I would have to make inquiries about that.

THE COURT: Would that be under your jurisdiction?

THE WITNESS: No, your Honor.

THE COURT: Is it ever sent into the Central Records Bureau?

THE WITNESS: It is after a certain time. Usually they keep them a little longer than the uniformed forces.

THE COURT: Well, can you get that by this afternoon?

MR. HAUSCH: I hope so, your Honor. I believe I can.

THE COURT: All right.

MR. GRASECK: Well, your Honor, I would like to ask some questions relating to the colloquy that was just had.

THE COURT: Let's mark that for identification, please.

(Above referred to item marked as People's Exhibit 4, for identification.)

CROSS EXAMINATION

BY MR. GRASECK:

Q Sergeant Adamo, is that the correct name?

A Yes, sir.

Q Are you familiar with the regulations relating to the keeping of this Precinct blotter?

A No, I am not.

Q Well, do you have knowledge as to what the practice is relating to what goes into this blotter?

A Yes.

Q Could you state what that practice is?

MR. HAUSCH: I would object to the generality here, your Honor. I think we can pin this down to specific questions.

THE COURT: As to what?

MR. HAUSCH: Well, I think counsel may be driving at the fact as to whether a detective going in or out

of the Precinct would be recorded in this book if he were not accompanied by a prisoner.

THE COURT: Is that germane and material?

MR. GRASECK: Yes.

THE COURT: Do you want to put that question to the witness?

MR. GRASECK: All right.

Q Would a detective unaccompanied by a prisoner, be logged in and out of this blotter?

A Well, I can't say for certain whether they do or not because I think the detectives would be able to better answer that question than I could.

Q Do you know whether or not the activities of detectives unaccompanied -- without regard to prisoners, are logged in this blotter?

A I couldn't say for certain.

Q I notice, for example, on this blotter there is an entry, "1342, Detective Donohue, O. W., requested assistance Nassau Road, Roosevelt on investigation C. B. 249. Notify." So, it would appear that there are things that detectives put into this--

A Yes, sir.

Q Would it be your -- how long have you been involved in record keeping of police business?

A About 18 years.

Q And, are you familiar with what the practice is with respect to making entries in this blotter?

A No, I am not, sir.

Q Have you had occasion to look at blotters of this kind from time to time?

A Yes, I have.

Q Have you seen entries as to detectives coming and going from Precincts?

A Yes, I have.

Q Would you think the better practice would be for a detective leaving a Precinct to make an entry or have an entry made?

A I couldn't answer that question.

MR. HAUSCH: Objection.

THE COURT: Sustained.

Q On the right of this document marked for identification, there are a series of times starting with 1400 and going through to 1439. I presume that would be the same day?

A Yes.

Q The next group of entries?

A I would presume that would be the same date.

Q And, it is a fact, is it not, that there is no entry for 1415 in this document?

MR. HAUSCH: I would ask that the witness be allowed to examine the document.

THE WITNESS: Repeat that. You mentioned 1415?

Q Right.

A Well, no, this is the complete page. That would be on the following page. This goes up to 1400, this page here, (indicating).

Q But, isn't it a fact that a portion of the following page is in that photocopy?

A You see -- true. That's a portion of the following page.

Q And that exhibit would indicate, would it not, that there was no entry made relating to 1415?

A Yes.

MR. GRASECK: I have no further questions.

I would simply ask, your Honor, if this document is to be admitted in evidence, that the succeeding documents for the remainder of the day up until Detective Donohue went off duty in the same blotter, be also entered in evidence. This is a selected portion of the blotter entries, and I think that in light of the testimony, it is reasonable to ask that the whole picture be presented to the Court.

MR. HAUSCH: In other words, you are asking for

blotter entries from 1357 until the end of the day?

MR. GRASECK: Right. I believe he said he went off duty at 5 o'clock. That's my recollection, but whatever it was, that's what I want.

THE COURT: In the light of what was said here, don't we have to get the other blotter?

MR. HAUSCH: Yes, your Honor.

Counsel, do you want the witness back or would you stipulate that photocopies will be entered into evidence if I give you the entire record?

MR. GRASECK: Yes.

MR. HAUSCH: And I will give you the detective squad blotter also.

MR. GRASECK: I don't have any recollection of the detective's blotter being brought into the picture. My recollection of the testimony was that the same document -- that entries were made on the same document relating to the arrival. It seemed to me that Detective Donohue indicated he was relying on a writing to state that his arrival at the Precinct was very shortly before 2 o'clock, and relying on the same document for the proposition that he left to conduct his investigation of the vehicle at 2:15. Now, that's just my recollection of the testimony, and if it is correct, your Honor,

this would be the document that would be relevant, (indicating).

THE COURT: Well, frankly, I don't recall any reference like that.

MR. GRASECK: He did come up with a time of 1415.

THE COURT: Yes, he referred to that time.

MR. GRASECK: And he did appear to have some reason for saying it wasn't 1414 or 1416. And I thought that the District Attorney asked him something about blotter entries at the time he was so testifying.

MR. HAUSCH: That's not my recollection, your Honor, but I will secure the blotter for the period of time in question up until the time the defendant was transported to Headquarters.

THE COURT: All right.

MR. HAUSCH: Sergeant, you may stand down.

(Witness is excused.)

MR. HAUSCH: Judge, if I understand correctly, you are not requiring the Sergeant to come back. We will put the records in?

MR. GRASECK: Right, I will assume that the photocopy will be an accurate photocopy.

THE COURT: Now, before we proceed with the hearing, I understand that defense counsel is going to ask to

ask to reopen his case, is that correct?

MR. GRASECK: Yes, your Honor. I would like to recall Mr. Holland briefly, to clarify a matter that was testified to yesterday.

MR. HAUSCH: No objection.

THE COURT: Take the stand again, Mr. Holland.

B O S S I E L E E H O L L A N D , having been previously duly sworn, resumed the witness stand and testified as follows:

THE CLERK: You are still under oath.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION

BY MR. GRASECK:

Q Mr. Holland, could you state your recollection of the period that you were in custody at the First Precinct?

A Yes, sir. I remember, I said yesterday, it was a good hour, an hour and a half at the time when they took me there. You are referring to when I was with Detective Donohue the first time before he left, sir?

Q Let's start with that, right.

A Is that what you are referring to?

Q Yes.

THE COURT: Now, you said in custody. There may be some argument about that, at least. Let's say he

was at the Precinct Stationhouse when he was taken there by Detective Donohue.

MR. GRASECK: Let me start over again, your Honor.

Q Could you state your recollection of the period during which you were at the First Precinct until the time that Detective Donohue left with your keys?

A I remember we arrived at the Precinct about 1:45 or 1:55, and Detective Donohue was with me a good hour or hour and a half before he left with my keys.

Q Can you explain your response yesterday to a question referring to Detective Donohue leaving at 1415?

A Yes, sir. I remember the District Attorney asking me the question, and I answered the question, "Yes, an hour or an hour and a half", and I meant that he was there an hour or an hour and a half. That's what I meant when I answered his question.

MR. GRASECK: I have no further questions.

CROSS EXAMINATION

BY MR. HAUSCH:

Q Mr. Holland, there came a time when Detective Donohue brought the typewriter into the Precinct?

A Yes, sir.

Q And what is your best recollection of that time?

A Sir, it was an hour, an hour and a half he was gone.

THE COURT: You are saying that you were there for an hour to an hour and a half with the Detective, and then he was gone for an hour to an hour and a half, is that what you are saying?

THE WITNESS: No, I am saying I was there a good hour, an hour and a half before he left with my keys, and he was gone about two hours to my best recollection.

Q All right. There came a time when he brought the typewriters back into the squad room?

A Yes, sir.

Q And, about what time was that?

A I would say about a good two hours, sir, after he left.

Q Two hours?

A About two hours, I think.

Q Now, to backtrack, if I may: It is your recollection you arrived at the Precinct sometime between 1:45 and 1:55?

A Yes, sir.

Q And the detective was with you an hour to an hour and a half?

A Yes, sir.

Q He left then, and about two hours later he came back with the typewriter and the tools?

A Yes, sir.

Q When is the last time that this typewriter was in your possession?

A I beg your pardon?

MR. GRASECK: Objection, your Honor. I think this goes beyond the scope of the inquiry.

THE COURT: Sustained.

Q Did you recognize the typewriter?

A No, sir.

MR. GRASECK: Objection, your Honor. I think that's irrelevant. I assume he's just inquiring about the line of inquiry that we opened up, which has to do with the times.

THE COURT: Sustained.

Q Did you have any conversation with the detective about this typewriter?

MR. GRASECK: Objection, your Honor, same objection.

THE COURT: Overruled.

THE WITNESS: Would you repeat the question, please?

Q Did you have any conversation with Detective Donohue about the typewriter?

A He made a statement. He said, "Now you are under arrest".

Q Did he make a reference to the typewriter?

A I think he did.

Q You made no comment as to the typewriter?

A I told him I didn't know what he was talking about.

MR. HAUSCH: Nothing further.

MR. GRASECK: No further questions.

THE COURT: You may stand down.

THE WITNESS: Thank you.

(Witness is excused.)

THE COURT: Both sides rest on the hearing except for the production of the--

MR. GRASECK: Well, your Honor, I would like to make an effort to communicate further with Mr. Sutter's office over the luncheon recess, if I could.

THE COURT: All right. I will put it down for 2 o'clock.

MR. HAUSCH: Thank you, your Honor.

MR. GRASECK: Your Honor, do you want to discuss the bill of particulars?

THE COURT: Yes, I do. We will discuss it off the record so we can see if we can get it straightened out and then put it on the record.

(Discussion off the record.)

(The following ensued in chambers.)

THE COURT: Do you waive the presence of the defendant?

MR. GRASECK: Yes, your Honor.

THE CLERK: People versus Bossie Lee Holland, Indictment Number 39863.

THE COURT: We have just had a conference regarding defense counsel's request for additional specifications in response to a bill of particulars, and I will let you, Mr. Graseck, state what your request is.

MR. GRASECK: Right. Let me explain it. Starting with the previous demand for the bill of particulars submitted by Mr. Rubin, which called for the exact time that the alleged crimes were committed, the precise place or places inside or outside of a dwelling, and the exact location where the crime was set forth in the instant indictment are alleged to have occurred, and then the exact date or dates the alleged crimes were supposed to have occurred.

In response to that, the District Attorney stated simply that it was at this 95A Nassau Road address, at an unknown time between April 6th, and at 8 A. M. and April 9th, at an unspecified time.

Now, specifically, as I see it, that creates a problem on the two charges relating to possession, one of stolen property and the other of burglar's tools because the D. A. now, I understand, is not limiting

these alleged possessions to that address, and it is broader, and he is asserting that the possessions may have occurred over a period of at least two days, and at several different places. Now, it is conceivable that if we had a precise time and place and date, especially as to the possessions alleged, we could or would assert an alibi defense. I just feel that it would be helpful if we had a more precise statement of the time and date and place that these crimes were supposed to have been committed.

MR. HAUSCH: Your Honor, by the very nature of the charge of possession of stolen property, I think it will become evidentiary nature as to the exact time. That would be given to it by an interpretation of the evidence as it would be presented to a jury. The best answer we could possibly give to this demand would be to allege that the possession of the stolen property occurred from an unknown time on April 8th, or April 9th, of 1974, the time of the commission of the burglary, until that property was recovered by the Police Department on April 9th. As to the possession of the burglar's tools, again, it would be our position that it is a continuing possession, which we could only limit to the time that they were in fact, brought into the

police custody, which would have been on the afternoon of April 9th. Again, this would be a continuing possession, the point of which it began we are unable to specify.

THE COURT: I think in a preliminary discussion we had, you also stated the theory of your case, which was that you expected to be able to show that the burglary occurred, and then that the defendant was in possession of the alleged proceeds of the alleged burglary at sometime subsequent, and that this would be shown by the testimony of a witness, Mr. Vassallo, and on that basis the defendant is apprised of the nature of the evidence and the theory that the People are going to adopt. So, it seems to me that assists you, Mr. Greeck, in knowing what you have to meet, and, of course, as far as alibi is concerned, there has been no notice of alibi or no notice of an intention to call alibi witnesses, and if, in any event, you are surprised by the testimony of the People, I will give you an opportunity to meet it by whatever means are necessary.

So, I am ruling that the information submitted is as precise as the People are able to give it at this time, and, therefore, we will proceed on the basis of what you now have. Now, do you have anything else?

MR. GRASECK: Well, we talked before about the minutes. Can we resolve that without a formal motion on papers?

THE COURT: I think it's necessary to have papers. It is not timely. It involves proof and an opportunity for the People to meet it, and it also involves a potential delay in the trial because the minutes, I believe, will not be available. In fact, we haven't even completed our hearing as yet, although I guess all of the testimony is in, but I am informed that the very earliest would be Tuesday and probably later, before we could get the minutes.

MR. GRASECK: Well, if we went to trial, there would be some preliminaries that would take place, in any event.

THE COURT: You are talking about the selection of the jury?

MR. GRASECK: Right.

THE COURT: Well, if you would be able to go ahead with the selection of the jury, and I would think there would be no reason why we couldn't, that might put a different aspect on the matter. We could start selecting a jury on Monday. I have just been informed there are no juries available in the jury pool at

this time, this being Friday. I would suggest this: That if you are going to pursue this application, that we go back on the record in the courtroom, and I will give you an opportunity to call Mr. Holland, if you wish, to testify as to his indigency, particularly in view of the fact that he has retained counsel.

MR. GRASECK: Let me discuss that with him, your Honor. I conclude that he's an indigent on the basis that he was found eligible for Legal Aid.

THE COURT: Well, there have been cases known there where people obtained Legal Aid and it was discovered that they had assets or income.

MR. GRASECK: Let me just talk to him before we proceed to that step.

MR. HAUSCH: Judge, if I may, I have to obtain these records which the Court would like when we reconvene at 2 o'clock. Might I suggest that we put that matter over until 2 o'clock also so that I may go about securing these records.

THE COURT: Yes. I will just comment on your statement that the Court has never indicated it would like those records.

MR. HAUSCH: Yes, your Honor, that's correct.

THE COURT: All right. Put it over until 2 o'clock.

(Luncheon recess).

- - -

AFTERNOON SESSION

THE CLERK: People versus Bossie Lee Holland, Indictment Number 39863.

Hearing continued.

MR. HAUSCH: Your Honor, I do have a copy of the complete blotter entries beginning at 1252 on April 9th and continuing through 2045, which would be 8:45 P. M., which I would offer into evidence, at this time.

MR. GRASECK: I have no objection.

THE COURT: All right. We will receive it.

(Above referred to item marked as People's Exhibit 5, in evidence.)

MR. HAUSCH: Your Honor, I do have the squad blotter, photostatic copies of it, and I also have Detective Meehan here, whom I wish to call as a witness to introduce this document.

THE COURT: You may go ahead.

MR. HAUSCH: Call Detective Meehan.

D E T E C T I V E J O H N J . M E E H A N ,

Shield Number 175, Nassau County Police Department, New York, First Squad, called as a witness by the People, having first been duly sworn, testified as

follows:

DIRECT EXAMINATION

BY MR. HAUSCH:

Q Detective Meehan, at the request of the District Attorney's Office, did you photostat copies of pages 113 and 114 of the squad blotter?

A Yes, I did.

Q And would you explain to the Court the purpose of the blotter as it is applied in the First Squad?

A The basic purpose of the Detective Squad blotter differentiating from the desk lieutenant squad blotter would be that the detective squad blotter is basically a time report for the convenience of the detective sergeants and lieutenants to know who has what cars and in what vicinity they may be at any given time during the day.

Q In other words, it is to keep track of the detective personnel?

A Detective personnel, what cars are on the road, and in the general area they may be, whether it is Court or what town.

Q And is this record kept in the ordinary course of police business?

A Yes, sir.

MR. HAUSCH: May I have these two pages marked

for identification as one exhibit, your Honor?

THE COURT: Mark it.

(Above referred to item marked as People's Exhibit 6, for identification.)

Q Detective Meehan, would you explain to the Court what those two sheets are?

A Well, this is pages -- this is two copies of page 113 of the Detective Division's blotter, indicating the date, Tuesday, April 9th, 1974, starting with a time entry of 1310, which would be 1:10 P. M., and ending at 1656, which would be 4:56 in the afternoon.

Q And why do you have two copies?

A I have two copies because I made them today about a quarter after one, and the width of the book is much wider than the Verifax machine itself. So on one side I get the number 113, but it cuts off the time entries. On the other side I have the time entries, and indicated page 113 here, and this cuts off part of the entries on the rear, which aren't as important as the time entries on this side, (indicating).

Q So, in other words, those two pages coincide with each other?

A Yes, inasmuch as if you put the printed number in the book, line up the lines with that, they will read the same

across top and bottom.

MR. HAUSCH: I would offer those pages into evidence, your Honor.

MR. GRASECK: Can I have a voir dire on that, your Honor?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. GRASECK:

Q Detective Meehan, were these copies made by you?

A Yes, sir.

Q And the book from which these copies were made, is that presently at the First Precinct?

A Yes, sir, today.

Q Is this the same book that is presently in use?

A I don't believe so. I can tell you in a moment. I have a note here with me. No, this book is squad blotter number 22. It was started on March 8th, 1974 and closed on September 7th, 1974. So now we have a different book.

MR. GRASECK: I have no further questions.

I would ask, your Honor, if it would be possible to have access to the book so we could verify these documents. It would appear that that would not be an overwhelming administrative burden, particularly in view of the testimony that this book is now not in use

and not essential.

THE COURT: Well, what is the question about it? Didn't you consent to photostat?

MR. GRASECK: Well, my focus was on the other document.

THE COURT: And isn't this a collateral matter?

MR. GRASECK: It is a collateral matter, yes, but the fact that it takes two duplications to come up with this -- I mean, it appears to be genuine, but I just wonder about the fact that it takes two duplications to come up with this. I wonder whether it wouldn't be a better procedure to have the actual book in Court.

THE COURT: Well, if you will show me some necessity for it, I will consider it, but what's going to be accomplished by this in the area of proof on the issues in this hearing?

MR. GRASECK: Well, all right. I would consent to this. I would ask that the other documents, which include the checkout time of the detective, also be included.

MR. HAUSCH: I am going to offer that next.

MR. GRASECK: All right.

THE COURT: All right, we will mark this in evidence now.

(People's Exhibit 6, for identification, now marked as People's Exhibit 6, in evidence.)

MR. HAUSCH: May I have this marked for identification, please?

(Above referred to item marked as People's Exhibit 7, for identification.)

DIRECT EXAMINATION

BY MR. HAUSCH (Continuing):

Q Detective, what is People's Exhibit 7, for identification?

A This is page 114 of Detective's Blotter Number 22, Tuesday, April 9th, 1974, from the time 1700 to 2355 inclusive.

Q And that would be the next entry after People's Exhibit 6, in evidence, the sheet number 113?

A Yes, sir, it would be.

Q And did you yourself make this copy?

A Yes, I did.

Q And is that kept in the ordinary course of business of the Police Department?

A Yes, sir, it is.

MR. HAUSCH: I would offer it in evidence, your Honor.

MR. GRASECK: I have no objection.

THE COURT: Mark it in evidence.

(People's Exhibit 7, for identification, now marked as People's Exhibit 7, in evidence.)

MR. HAUSCH: I have no further questions of this witness.

THE COURT: Anything you want to ask the witness?

MR. GRASECK: Yes, I would like to ask him a few questions, your Honor.

CROSS EXAMINATION

BY MR. GRASECK:

Q You made reference to two separate records, isn't that right? There is this record and there is the other record?

A Yes, sir, I did.

Q Could you state what activities of the detective would ordinarily be placed or made a record of in the other record?

A The other book is a more complete book for the benefit of the desk lieutenant of the uniformed force. Such entries the detective would put in there would be any time they would arrive at the stationhouse with an individual for questioning, or booking, or investigation, or arrest. They would have to bring that to the attention of the lieutenant on the first floor before they proceeded any further into the building to the second floor. Another

thing that might be noted in the desk lieutenant's record that isn't in the detective's blotter would be a request for a time for booking, when you ask for an arrest number. This would possibly be done when you are well progressed through the paperwork of the case pertaining to the individual. It could be done at any time at the discretion of the detective. It is not important that it is done first, last or in the middle.

Q These two documents are a continuous record, it appears, that would be correct, wouldn't it, pages 113 and 114?

A Yes, that's correct, sir.

Q Have you looked at these records for their content?

A No. I just generally looked them over, that's all.

Q Well, let me show them to you, and I ask you if there is any record of the return of Detective Donohue after his trip to Roosevelt as recorded, (handing).

THE COURT: Okay.

A As regards to Detective Donohue, there is an entry here, "1415", meaning 2:15 P. M. "Detective Donohue to Roosevelt, car 1216".

Q Right.

A The next entry regarding Detective Donohue in this detective's blotter is 1900, "Detective Donohue off

duty".

Q And just prior to that 1900 entry there is another entry, is there not, relating to the car that those records indicate Detective Donohue was using?

A (No response.)

Q My recollection was that it was about 1656 there are some three officers who used the same car.

A No, I don't find that.

Q Let me just take a look. Maybe I can find where I was referred to.

A That car's number isn't mentioned on either page for the rest of the day.

THE COURT: Show it to counsel.

THE WITNESS: We are talking about car 1216, not 1214.

THE COURT: What's 1214?

THE WITNESS: That's another car number. He might have 1214 mixed up with 1216.

Q Now, the bottom entry, if I am correct, on page 113, is Detective--

THE COURT: Speak up, please.

Q The bottom entry on page 113 is Detective Gullen, (phonetics), and another name, and Sheehan, Patrol car 1216 for a 1656.

BEST COPY AVAILABLE

A Was it 16? I forget. I will have to look at it again.

Q All right, (handing).

A I stand corrected. It is car 1216.

Q So then would it be correct to conclude that there is no record of the return of that car to the Precinct by Detective Donohue?

A Well, assuming from this, if Donohue left at a quarter after two, he had to be back before 1656 for somebody else to take the car out of the Precinct again. That you will see I can tell you.

Q There would be no way of knowing when he returned except that it apparently was prior to 1656, is that correct?

A Right. Apparently when Detective Donohue came back, he didn't sign in in the blotter, in the detective's blotter. I don't know whether he signed in in the downstairs blotter or not.

Q Right. Now, those times are entered by whom?

A Usually the individual.

Q The person who takes the car?

A Yes. If three people go out in the car together, then one person would sign for the three of them.

Q Could you indicate the times before and after that

1415 entry?

THE COURT: The entries?

MR. GRASECK: Yes, I'm curious just what times appear above and below the 1415 entry of Detective Donohue.

A 1358, there is an entry here, "Detective Donohue present in car 1216". That's the entry above 1450. Now, you want the entry after 1450?

Q Right.

A It says, "1500: Police Officer Ellis to Seaford in car 1217". Do you want anymore?

Q No, no. Let me just take a look, if I could. Is there anyone who monitors the making of these records, or would that be the responsibility of the individual who takes out the vehicle?

A The individual who takes it out.

MR. GRASECK: I have no further questions.

MR. HAUSCH: No redirect.

THE COURT: You may stand down.

THE WITNESS: Thank you.

(Witness is excused.)

MR. HAUSCH: People's caseon the hearing, your Honor.

MR. GRASECK: Your Honor, we have been talking to representatives of Mr. Sutter's office. We would like

to present evidence supporting Mr. Holland's testimony as to calling that office shortly after his being taken into custody, and I have been talking to Mr. Winslow, and he's more or less available, but I had to make a call, and there is a question about--

THE COURT: When you say, "more or less available", do you mean he is available on call?

MR. GRASECK: He is on call, right.

THE COURT: Well, can you make an offer of proof. First tell me what the other thing is?

MR. GRASECK: Well, it is not clear whether we also are going to call Mr. Sutter, or whether what we want to get in we can get in just by Mr. Winslow, and Mr. Sutter, I understand, is occupied upstairs. So, I am just not sure about the mechanics of it.

THE COURT: Well, do you want to tell me what you expect to show?

MR. GRASECK: Well, I already did tell you that I think in a hearing of this kind the question is really the reliability of the testimony, and the issue is whether there was consent, and there is a direct conflict in the testimony on that issue, as there is also a direct conflict on the question of whether this call was made during the time that Detective Donohue

was at the Precinct, and especially shortly after Mr. Holland's arrival. I believe that Mr. Winslow and/or Mr. Sutter can verify Mr. Holland's version.

THE COURT: Well, that's what I am getting at. Do they have a recollection sufficient to make it desirable to bring them in, or don't they?

MR. GRASECK: Yes. I have spoken to Mr. Winslow and to Mr. Sutter, and that's my conclusion, that their recollection would be reasonably precise and would support Mr. Holland's testimony.

THE COURT: I would say we needed each of them perhaps about ten minutes.

MR. GRASECK: It wouldn't be very long, no, your Honor.

THE COURT: Well, I will see if I can get Mr. Sutter excused on a break from his trial if he is still on trial upstairs. I will take a recess, and you can call Mr. Winslow.

MR. GRASECK: Fine, your Honor.

(Recess.)

(After recess.)

THE CLERK: People versus Bossie Lee Holland, Indictment Number 39863.

Hearing continued.

THE COURT: I have sent upstairs for Mr. Sutter, and I have some hopes that we may be able to get him and bring him down, or, ask him to come down, so we will see if he appears. If he doesn't, we are out of luck because I can't do anything more for you.

MR. GRASECK: May I call Mr. Winslow, your Honor.

THE COURT: Yes.

D A N N A W I N S L O W , residing at 10 Horseshoe Road, Old Westbury, New York, called as a witness by the Defendant, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRASECK:

Q Mr. Winslow, could you state your occupation?

A I am an attorney.

Q And what is your association, if any?

A I am of Counsel to the law firm of Sutter, Moffitt, Yannelli & Zevin, formerly Bracken & Sutter.

Q Were you so associated on April 9th?

A I was.

Q Of this year?

A Yes.

Q Do you have a recollection of your activities on the afternoon of that day?

A I have a recollection of my activities on that day, yes.

Q Did there come a time that you became involved with Mr. Holland?

A Yes, there came such a time.

Q Can you state what happened?

A Yes At approximately 6:30, between 6:30 and 7 o'clock, I received a telephone call -- this is as to my best recollection -- from Mr. Holland. He stated in the call that he had previously spoken to Mr. Sutter of our office, and he asked me to please help him with respect to a criminal problem that he had at that point. He was then in the custody of the Police. I spoke to a detective, either prior to or just subsequent to my conversation with Mr. Holland. Thereafter -- well, I will stop there.

Q Did you discuss this matter with Mr. Sutter?

A Yes. I immediately contacted Mr. Sutter to see what, if anything, he wished the firm to do with respect to this case. Mr. Sutter told me--

MR. HAUSCH: Objection, your Honor.

THE COURT: Overruled.

A Mr. Sutter told me that he had previously spoken to Mr. Holland, and to please do anything that I could to effectuate his release. I then called the duty District

Attorney, and I had a conversation with him respecting the establishment of bail, and the possibility of having him arraigned or bail set and released that night. It came to pass--

THE COURT: Excuse me. Is this material to our hearing?

MR. GRASECK: No, your Honor, it is not.

THE WITNESS: All right, fine.

Q Do you have any knowledge as to when this prior to your office might have been made?

A No direct knowledge, but indirect knowledge as a result of conversations with you, and--

MR. HADSCH: I object to this, your Honor.

THE COURT: Sustained.

Q Now, you stated -- did you discuss this matter with anyone in your office?

A Yes.

THE COURT: Well, this would all be after 7:30 or 8 o'clock. Is that what you are talking about?

MR. GRASECK: The discussion?

THE COURT: Yes.

MR. GRASECK: Yes, your Honor.

Q Do you know whether or not Mr. Holland ever had prior dealings with the office with which you are associated?

MR. HAUSCH: Objection.

THE COURT: Sustained. I don't see that that is material.

MR. GRASECK: I am trying to demonstrate the plausibility of Mr. Holland's calling Mr. Sutter.

THE COURT: All right. I will take it.

A I know from conversations with Mr. Sutter that Mr. Holland had had previous -- had been previously represented by our office.

Q Do you know anything about any income producing activities of his that might have been related to the office?

A Yes. I also spoke to Mr. Armond Romano, who is the President of Interline Security, who informed me that he was an employee of Interline Security for some time, who is our major investigative source.

MR. GRASECK: I have no further questions.

CROSS EXAMINATION

BY MR. HAUSCH:

Q Mr. Winslow, the first contact you had with the defendant Holland or with any matter relating to him was some time after 6:30 P. M. on April 9th?

A That's correct.

MR. HAUSCH: No further questions.

THE COURT: You may stand down.

THE WITNESS: Thank you.

(Witness is excused.)

THE COURT: Some calls have been placed, and word has been left, as I indicated, with the Judge's Part upstairs where Mr. Sutter has been on trial, and I don't see that he has appeared. I understand they have finished that trial, so I think we will have to continue without him.

MR. GRASECK: Well, your Honor, we don't have any more witnesses.

At the conclusion of the hearing, I was going to ask the Court to reserve decision and give me an opportunity to prepare some kind of a presentation upon receipt of the transcript. So if we were to wait a few minutes for Mr. Sutter, or to spend until -- to see if it is possible to get him here, I don't think it would be holding the Court back.

THE COURT: Well, I am willing to do this: I am not willing to spend the rest of the trial until such time as you get the transcript and prepare a memorandum, if that's what you had in mind. I will take argument from you.

MR. GRASECK: There would be no need, would there, to make -- the trial could begin before the determination

was made on the issues that have been raised on this hearing. We could pick a jury and have opening statements. Certainly, we could pick a jury, which couldn't begin prior to Monday, according to what I understand.

MR. HAUSCH: Your Honor, we would be precluded from any appeal from this hearing if it should be adverse to the People. There could be a situation where the Court could express (sic) certain evidence which would make it unfeasible for us to proceed to a trial. Once a jury has been selected, of course, jeopardy has attached.

THE COURT: I suppose we could go into partial selection without causing jeopardy to attach, but it is pretty hard to regulate that situation.

MR. HAUSCH: Yes, your Honor.

THE COURT: Would you gentlemen come to the Bench, please.

(Discussion at the Bench.)

(Recess.)

(After recess.)

THE CLERK: People versus Bossie Lee Holland, Indictment Number 39863.

Hearing continued.

MR. GRASECK: I call Mr. Sutter.

JOHN JOSEPH SUTTER, residing at 101 Horton Street, Malverne, New York, called as a witness by the Defendant, affirmed to tell the truth and testified as follows:

DIRECT EXAMINATION

BY MR. GRASECK:

Q Mr. Sutter, could you state your occupation?

A I am an attorney and counsellor at law.

Q Could you state your association?

A I am a partner in the firm now known as Sutter, Moffitt, Yanelli and Zevin, P. C.

Q Do you know the defendant, Mr. Holland?

A I do.

Q Could you state for how long you have known him?

A That would be rather difficult, but it extends over several years.

Q Had you had any relationship with him prior to April 9th of this year?

A Yes, sir.

Q Would you indicate the nature of that relationship?

A Attorney and client, and at least speaking friends.

Q Did you know anything about his income producing activity before that time?

MR. HAUSCH: Objection.

THE COURT: Overruled.

A I knew both from Mr. Holland and from other friends of mine and associates of mine that at one time Mr. Holland was engaged in investigative activities in Hempstead, New York, and I believe that the location of his premises were in the Hempstead Bus Terminal. He was, if I may, working under the aegis of Interline Security, Inc., a licensed private investigator and watch guard corporation within the state.

Q Do you have any relationship or have you had, with that organization?

MR. HAUSCH: Objection.

THE COURT: Overruled.

A Yes, sir, extensive. Mr. Romano is the President. He's a very dear personal friend of mine, and his firm does practically all of the investigations for my law firm, or, our law firm; excuse me.

Q Did there come a time when you became aware of Mr. Holland's arrest on a burglary allegedly committed in Nassau County?

A Yes, sir.

Q Well, can you state the circumstances of your coming into that awareness?

THE COURT: Do you want to fix a time?

Q Well, did you have the same association on April 9th of this year that you presently have?

A No, sir.

Q What was your association at that time?

A At that time we had a partnership, and the firm name was Bracken & Sutter.

Q And was Mr. Winslow among your associates?

A Mr. Winslow was of counsel to the firm, but had his offices directly with ours in the same suite.

Q On or about that date, April 9th, did you become aware of Mr. Holland's custody?

MR. HAUSCH: Objection, your Honor. I think the witness should be allowed to tell his best recollection as to the date and time.

THE COURT: Sustained. You are leading.

Q Did you become aware of Mr. Holland's arrest on a burglary charge in this county?

A Yes, sir.

Q Do you have a recollection of the time or approximate time that that came about?

A The best that I can fit it would be in the spring, and I can fit it to the time that it was a normal working day other than a weekend.

Q And how did you become aware of his arrest?

THE WITNESS: Judge, may I answer that narratively?

THE COURT: Yes.

A I am not sure whether I took the call from Mr. Holland or whether somebody else took the call, and then reported it to me. I do, however, know and recall very distinctly that I was advised either by Mr. Holland or by an associate or partner in the office, that Mr. Holland had been incarcerated and arrested and charged, and I recall that the crime was burglary. I don't know what time of day it was. I would think it might have been some time in the latter afternoon. It is my custom to go back to the office after trial or court appearances and remain until approximately six.

Q Do you have any recollection of discussing Mr. Holland's situation with Mr. Winslow?

A Not with Mr. Winslow. I do have a recollection of speaking to somebody about it to check out where Mr. Holland was, to try and arrange for his release, and I know that I was going to return to the office that night, which is my practice in any event, and a lot of times I want to get home for dinner, and I think that's what happened this night, and I asked somebody to look into it for me and to see if in the evening we could arrange for a duty Judge from the District Court to have Mr. Holland released.

Q Would you be able to make any estimate of the time of day when you first became aware of Mr. Holland's situation?

A No, sir, not definitively, but my best recollection was that it was in the afternoon, and I believe in the latter part of the afternoon.

Q Do you have any routine that you generally follow on Tuesdays?

A Yes.

Q Could you state what that is?

A I go to the office at about 8:30 or 9 in the morning. If I am on trial, I leave--

THE COURT: Excuse me. I don't think that this is going to be material to your inquiry.

MR. GRASECK: Well, your Honor, there has been testimony about a meeting at a certain restaurant. I am simply trying to indicate--

THE COURT: I don't recall that. Would you refresh my recollection.

MR. GRASECK: My recollection is that Mr. Winslow testified that he saw Mr. Sutter at the Caucus Restaurant, and that--

THE COURT: Do you recall that, Mr. Hausch?

MR. HAUSCH: No, your Honor.

THE COURT: I don't have that recollection. What were you trying to show?

MR. GRASECK: I am just trying to indicate at what time Mr. Sutter would have been available to receive the call, and after what time, if any, he would not have been likely to be available to receive the call.

THE COURT: But, of course, you are only going on his usual activities, aren't you? That wouldn't indicate what happened on that date.

MR. GRASECK: I think the Court could take judicial notice that the day that this trial has been about was a Tuesday, and if there is a fixed pattern--

THE COURT: But Mr. Sutter has already testified that it was in the afternoon according to his recollection.

MR. GRASECK: Right.

Q Now, when you say, "the afternoon", would you be able to roughly define what hours include your afternoon?

MR. HAUSCH: Objection.

THE COURT: Sustained.

Q Do you know whether or not your first awareness was before 5:30?

A I honestly don't know, sir.

MR. GRASECK: All right, I have no further questions.

MR. HAUSCH: No questions, your Honor.

THE COURT: You may stand down.

THE WITNESS: Thank you, your Honor.

(Witness is excused.)

THE COURT: Anything further from either side?

MR. HAUSCH: Nothing by the People, your Honor.

MR. GRASECK: The defendant rests, your Honor.

THE COURT: For the record, gentlemen, Mr. Graseck at the bench, you stated that you had already ordered the minutes, is that correct?

MR. GRASECK: Yes. The defendant did, you might say, your Honor.

THE COURT: And can I ask you for the record when you expect to have them?

COURT REPORTER: Tuesday or Wednesday, Judge.

(Whereupon, the above hearing was concluded.)

- - -

C E R T I F I C A T I O N :

I hereby certify the above minutes to be true and accurate.

_____

Official Court Reporter

COUNTY COURT : NASSAU COUNTY
PART III

- x

THE PEOPLE OF THE STATE OF NEW YORK : 39863

-against- : Ind. #~~36893~~

BOSSIE LEE HOLLAND, :

Defendant. :

- x

Mineola, New York
December 9, 1974

B e f o r e :

HON. DOUGLAS F. YOUNG, County Court Judge.

A p p e a r a n c e s :

ROGER HAUSCH, ESQ., Assistant District Attorney,
for the People.

ARTHUR V. GRABECK, JR., ESQ., for the Defendant.

- - -

MINUTES OF DECISION ON HEARINGS

- - -

Reported by
Michael Yerner
Official Court Reporter

BEST COPY AVAILABLE

THE CLERK: People versus Bossie Lee Holland, Indictment Number 36893.

For hearing.

People ready?

MR. HAUSCH: Yes, your Honor.

THE CLERK: Defendant ready?

MR. GRASECK: Yes.

THE COURT: Do we have a statement as to the reason for the delay that we had this morning?

MR. GRASECK: Well, I understand that Mr. Holland was detained. I got a message from one of the Court Officers that he called and said that he had car trouble and that he was coming by public transportation.

THE COURT: Mr. Holland, what was the problem, please?

THE DEFENDANT: I had to get the Long Island Railroad train out of Central Islip, sir, and I think the train is at 9:30. I called the court and told them my whereabouts.

THE COURT: I understand that you did call, yes, but I wanted to hear from you. Did you have a car break-down or what?

THE DEFENDANT: Yes, and I had to ride the train.

THE COURT: In other words, you haven't been using

your car, is that it?

THE DEFENDANT: I have to ride the train, yes, sir.

THE COURT: Well, you are not answering my question.

THE DEFENDANT: I don't have the automobile anymore.

THE COURT: Well, you will have to make arrangements, of course, to be where you can get here on the time scheduled by the Court.

THE DEFENDANT: Yes, I have a schedule now, sir, and I can get an earlier train.

THE COURT: All right.

Do you gentlemen have something further on the hearing?

MR. HAUSCH: Yes, your Honor. John Sutter indicated on Friday that he recalls talking to the defendant over the phone, but he could not recall the occasion, except to say that it was sometime in the Spring of 1974.

I spoke to Detective Donohue this morning. He said that he did refresh his recollection. He does recall that the defendant did, in fact, speak to Mr. Sutter on the 9th of April. He didn't recall it because he did not himself speak to Mr. Sutter. He indicates he merely dialed the phone and handed it to the defendant.

THE COURT: Well, this is simply a statement made

by counsel, which has no evidentiary value.

MR. HAUSCH: Your Honor, I wanted to make counsel aware of the fact and make the Court aware of it.

THE COURT: All right, is that all?

MR. HAUSCH: That's all I have, your Honor.

THE COURT: That's all you have?

MR. GRASECK: Well, could I ask your Honor if we could, perhaps, stipulate that if the detective were called today as a witness, he would testify that his prior testimony was inaccurate in this respect?

MR. HAUSCH: I wouldn't stipulate that it was inaccurate, your Honor. I would stipulate that the detective's recollection was refreshed upon learning of Mr. Sutter's testimony, and that in fact, he did make a statement to me that I have made on the record.

THE COURT: Did he say when this conversation, or when this call, rather, occurred?

MR. HAUSCH: He recalls it was April 9th, while the defendant was in custody.

THE COURT: But he couldn't recall the time?

MR. HAUSCH: No, your Honor.

MR. GRASECK: Well--

THE COURT: Counsel is willing to stipulate to that?

MR. GRASECK: That if he were called as a witness

today, his testimony would be to the effect that he just described.

THE COURT: That's right.

MR. HAUSCH: We would so stipulate.

THE COURT: So are you stipulating that and requesting that?

MR. GRASECK: Yes, your Honor.

THE COURT: All right. Do you want to give me any argument on the hearing?

MR. GRASECK: Yes, your Honor, I would like to for a few minutes.

THE COURT: All right.

MR. GRASECK: I would start off with the point that the District Attorney now makes, that the detective advised him that he does recall a call having been placed by the defendant at the time when he was in custody. When he testified, it appeared that there was really no doubt in his mind as to when a telephone call had been made. So his present statement would, I think, conflict clearly with what he testified to before, and in view of the fact that there is a sharp dispute as to when there was a consent to the search, I think the reliability of the detective's testimony is of central importance, and this raises further

questions about that reliability that I think have already been raised by other questions.

The detective's testimony was that there was no emptying of pockets by the defendant when he arrived at the Precinct. It seems to me this is in conflict with what common sense would suggest happened.

The defendant testified that he did, in fact, empty his pockets on the direction of the detective.

The District Attorney brought out the fact that the defendant has had prior experience in dealing with law enforcement officials. It may be presumed that the detective knew this as well as did the District Attorney. It seems entirely plausible that the defendant's testimony was right in this respect.

It is also beyond dispute -- it is not disputed that there were no statements made by the defendant. It is the detective's testimony that immediately after refusing to make any statements, the defendant consented to the search of his car. In view of the confusion of the detective as to the times, the time that he left the Precinct, which, according to the records in evidence was 7 o'clock, as distinguished from 5 o'clock, what he previously testified to, and his confusion on these other matters, I think it would be fair to

conclude that there was no consent, that the defendant's testimony is accurate in this regard.

Moreover, even if the detective understood there to be a consent, I think the weight of the evidence would compel the conclusion that it was perhaps a misunderstanding on his part. Any alleged consent occurred at a time when the defendant, according to my recollection of the detective's testimony, was not free to leave the Precinct. So, it is worth considering why this inquiry about the search of the car and whether the defendant would consent to it, was not made prior to his being taken to the Precinct, if free consent was being sought.

It is also clear from the testimony that it was a search that uncovered the bolt cutter and the mask and the typewriter cover. The only dispute as to those items, I think, is whether there was a consent.

The defendant's testimony was buttressed by that of Mr. Sutter and Mr. Winslow. Now, the detective acknowledges that he was right with respect to calling Mr. Sutter.

The District Attorney, in questioning of the defendant, undertook to demonstrate that he is sophisticated in dealing with police officers, and I think if that

conclusion is accepted, it does not logically follow that the defendant would at once call his lawyer immediately, as indeed a sophisticated person would do, and refuse to sign any statements, and then at the same time, freely consent to a search. If there were such a consent, it would have been helpful if we had some writing supporting it. It seems to me very unlikely that Mr. Holland would freely consent to such a search. His own testimony indicated he was aware of the presence of some of the articles that the detective stated were in his car, including a mask and a bolt cutter. So, knowing that such articles were in his car, and if we accept the premise that he is sophisticated, it seems that it would be extremely foolish for him to consent to such a search.

Now, as to the typewriter which was found in the physical custody of Mr. Vassallo, although at a time when, according to the People's theory, the case -- as divulged when we had discussions about a bill of particulars -- was in the possession of the defendant. Accepting arguendo, the premise of the People that the typewriter, although in the physical custody of Mr. Vassallo, was possessed by the defendant, I would argue that Mr. Vassallo was not in a position to consent to the

seizure of the typewriter, and in People versus Sanders, 277 New York Supp. 2nd, 487, the Supreme Court of Queens County concluded that a package given to a common carrier does not result in a forfeiture by the person who gives it up of his right of privacy to that package, and that if a search is to be justified after such an article has been given to a common carrier, it must be based on a search incidental to an arrest, or there must be a warrant. This was a case in which it was apparent from looking at the package, that marijuana was contained inside of it.

Similarly, in People versus Adorno, 234, New York Supp. 2nd, 674, New York County at the Criminal Court, it was concluded that a cab cannot be searched without the consent of the passenger. And I think it is axiomatic that if somebody put something in a safety deposit box in a bank, that it cannot be searched on the consent of a bank manager, that a warrant would be required.

Some of the testimony would suggest that this typewriter was held by Mr. Vassallo in an informal arrangement that perhaps is in some sense similar to a safety deposit arrangement, although the medium of exchange would not be money. Perhaps by some of the

testimony, we would conclude that there might have been some kind of an exchange of favors for his holding it. So, I think there is some question as to the legality of the seizing of the typewriter even though it was in the custody of Mr. Vassallo.

As to the Wade Hearing: There were, of course, discrepancies as to the time. The police record indicates that Mr. Holland was in custody from about 1:40, and at least until 7 P. M., and, according to Mr. Vassallo, he was with him at places other than the Police Department at 2 P. M. and some time after 3 P. M., and he buttressed this assertion by stating that he saw a clock on the wall. So it would appear that, like Detective Donohue, we have from Mr. Vassallo unequivocal testimony as to a time which cannot be supported by the objective facts in the record.

In addition, he acknowledged that some of the pictures shown to him were of persons clearly considerably younger than the defendant, and the remaining pictures were of persons considerably slighter of build than the defendant. So, I would contend that the pictures did not constitute a fair vehicle to determine whether or not Mr. Vassallo was able to identify the defendant, who, it is acknowledged, at the time he previously

allegedly saw him, was wearing a hat, so that his prominent bald head was not visible to Mr. Vassallo, although the picture displayed showed Mr. Holland with a bald head.

There was -- going back to the suppression hearing: There was testimony by Detective Donohue that he got possession of the defendant's driver's license at the scene of Mrs. Cowart's home. So, it would appear that he was aware of the existence of the vehicle at that point. There was apparently no discussion of a search of the car prior to the defendant being taken down to the Precinct. You would think that perhaps that would have been an appropriate time to consider a search, and I think the timing of this discussion of the search tends to buttress the testimony of Mr. Holland to the effect that when he was taken down to the Precinct, there was conversation about whether he would like to implicate Mr. Vassallo in criminal activities, and it may be that this conversation about a search of his vehicle was a response to Mr. Holland's unwillingness to respond to police questioning.

On a number of more or less collateral matters, it appears that the defendant's testimony is supported by common sense reasoning and by testimony of other

witnesses, and on the basis of the evidence, the weight of all of the evidence, I would urge the Court to conclude that there was no consent, no free consent by Mr. Holland to the search of his car.

THE COURT: All right, Mr. Hausch.

MR. HAUSCH: Very briefly, your Honor, I think the testimony was clear that the defendant was advised of his rights, and that, in fact, he did refuse to say anything at that point. Even though there is testimony in the case that the defendant spoke to a lawyer, there is no evidence that that attorney in any way advised the Police Department of any procedure that he wished them to follow. I think here we have a case of the defendant changing his mind, and, indeed giving permission for the search of his vehicle, motivated, of course, by the fact that he knew the typewriter was no longer in the vehicle.

As far as the Wade situation was concerned, your Honor, I believe Mr. Vassallo was very definite as to the various times he was able to view the defendant prior to his arrest. He indicated on the stand that he thought the pictures were representative, and, in fact, he could not state without looking at those pictures whether any of the defendants were approxi-

mately the defendant's age, or the defendant's build. He had to examine the photographs each time he was questioned as to that. So, I would think that that would not be a primary fact in making his identification.

I think, as far as the consent search, the detective's testimony as to the limited time the defendant was in the Police Station prior to being asked to consent to the search is borne out by an examination of the Police blotter and the Detective blotter.

Thank you.

THE COURT: I will take a short recess.

(Recess.)

(After recess.)

THE CLERK: People versus Bossie Lee Holland, Indictment Number 36893.

People ready?

MR. HAUSCH: People ready.

THE CLERK: Defendant ready?

MR. GRASECK: Yes.

THE COURT: I will render my decision on the two hearings. I will take up first the Wade Hearing.

I make the findings of fact that the witness, Mr. Vassallo, on April 9th, 1974, saw the defendant at

some time, approximately 2 P. M., and he had a discussion with the defendant for a period of approximately ten minutes. This was a face to face discussion. He made an appointment with the defendant to go to his place of business, and he talked with the defendant. At that time, he spent time, which he estimated was somewhere in the neighborhood of 20 minutes to a half hour, total, in the presence of the defendant, observed him in conditions in which the light outdoors was good, although it was not a clear day, and in light indoors which was mediocre, as he described it, neither light nor dark, but that he could see the defendant's features without difficulty.

He saw the defendant subsequently once on the street.

Thereafter, the witness was shown certain photographs of male blacks by Detective Donohue, and he went through these photographs, nine of them, and selected one which was the photograph of the defendant. He did so without receiving any prompting from the detective as to which photograph to select.

The witness did not see the defendant at the Precinct Stationhouse, and, in fact, he did not know at what time the defendant was there.

Now, I have taken into account either the

confusion or mistakes which the witness Vassallo had with respect to the times that were involved here, but I think the salient features of the hearing are the opportunities the witness had for observation, and they were substantial opportunities. Consequently, I believe that the witness' capability for recognizing the defendant and identifying him as the person with whom he had the contacts on April 9th, arose from his observation of him during those contacts, that his identification powers were not stimulated by seeing the photographs, and that the conditions of showing the photographs were not unfair or unduly suggestive, and, therefore, it is my decision that the testimony of the witness as to the identification of the defendant is admissible at the trial. The testimony by the witness as to identification of photographs would not be admissible, in any event, and, of course, is not admissible in this trial.

With respect to the Search and Seizure question, we have a much more difficult question to consider and determine. I find that on the date in question, Detective Donohue was advised that he was to make an investigation of an alleged burglary, and in the course of that investigation, he went to the apartment at the

rear of 95A Nassau Road in Roosevelt, and there present were the defendant and a woman who was the person who rented the apartment. The detective was accompanied by a Mr. Nelson, who was reported to be the victim of the burglary, which is the subject of this matter. There was a conversation. The detective asked the defendant for identification. He produced a license. The detective informed him he was investigating a burglary, and the detective requested the defendant to go with him to the First Precinct Stationhouse for further investigation.

A police car was called, and the defendant was taken to the Station house, arriving at approximately ten minutes or so before 2 o'clock. He was taken to the Detective Squad room, there was a conflict as to whether rights were read to him. I am finding that the rights were read to him by the detective. However, I don't think it is determinative in any way of this hearing, and that the rights read were substantially in accordance with the Miranda against Arizona requirements.

The defendant informed the detective that he would not answer any questions, and he refused to sign any statements.

Shortly after their arrival, the detective received a phone call from Mr. Nelson, and Mr. Nelson advised him that he had seen the defendant's car, and that he thought that his property, a typewriter, which was the property stolen in the burglary, might be in the car. The detective asked the defendant for permission to search his car, and the defendant agreed that he could search the car and delivered the keys to the detective. We have a conflict of testimony here, of course, as to whether the keys were simply put on the table along with other property of the defendant at the direction of the officers, and whether the detective did not simply pick up the keys and take them for the purpose of the search, and I am finding, as I have indicated, that the keys were delivered by the defendant to the detective. I think that the rationalization for his actions were that he believed that the typewriter, assuming that the typewriter was the subject of the burglary, and that the burglary happened, that the typewriter was no longer in his car, as was determined when the detective opened the car and searched it.

The detective did go to the place where it was indicated the car was parked, and he opened the trunk first, and he found a typewriter cover in there with

the name "Olympia" on it, and he looked in the front, and saw that there were some tools on the front seat, opened the car and looked on the front seat and under the front seat, and he found various tools, which also are subjects of this hearing. These, of course, are tools which would be adapted to breaking and entering into closed areas, as well as a mask, which might be used in some kind of illegal operation.

These items all were seized by the detective and taken back to Headquarters, at which time the defendant was informed that he was under arrest.

I am finding, however, that he was under arrest when he first arrived at the Precinct, notwithstanding the conflicting statements made by the detective. I find that he was in custody, and that he was not able to leave, and that he was, in his own mind, reasonably convinced that he was in custody, and that the circumstances justified this.

I find also, that after the defendant arrived at Police Headquarters with the detective, that he did ask for an opportunity to make a phone call, that he was given such an opportunity, that he called Mr. Sutter, and Mr. Sutter gave him some advice. Thereafter, the defendant, of course, refused to sign any statements,

having been, according to Mr. Sutter, advised that he shouldn't sign anything except the pedigree sheet and pro forma forms.

The detective then, after coming back with the tools, then left the room where the defendant was being held. He was then placed in handcuffs and handcuffed to a chair, and the detective disappeared and returned after seeing Mr. Vassallo, who was the sole witness in the Wade Hearing, and obtaining two typewriters from Mr. Vassallo, one of which was an Olympia typewriter.

Thereupon, the defendant was processed and subsequently was taken to Mineola Police Headquarters.

Obviously, the matter turns on a question of credibility, and that being the base for the finding of consent having been granted. I take into consideration the fact that the People have the burden of proof, and I find that the consent was given as testified to by the detective.

Accordingly, the items which are the subject of this hearing will be admissible at the trial, the People having borne their burden of proof of showing the consent to the search made by the defendant.

I have taken into account the fact that there are differences in the times which are recorded here. I

don't find them to be vital to the determination. In fact, all three of the principal witnesses -- in the Wade hearing, Mr. Vassallo, and in this hearing, Mr. Holland and Detective Donohue -- were somewhat inconsistent in their testimony as to times, but this has to be expected of people who are involved in matters which are not -- in which a record is not necessarily being kept by minutes and hours. So, I don't find that to effect my determination.

That's it, gentlemen.

MR. GRASECK: Your Honor, is there a determination as to the typewriter?

THE COURT: I didn't mention that. All right, I will mention that. The typewriter is admissible. All of the items, as I stated, are admissible, which are the subject of this hearing. The typewriter particularly, because it was not the subject of a seizure, as far as the record shows, having been obtained from Mr. Vassallo, and apparently without any objection on his part. I find that the defendant has no standing to contest the delivery by Mr. Vassallo of the typewriters to the detective.

We will be prepared to go at 2 o'clock.

MR. GRASECK: Your Honor, I would like to make a

motion for the Court to reconsider the previously made motion to inspect and dismiss based on the additional testimony that now the Court has heard as a result of these hearings. There was a motion made much earlier to dismiss the indictment based on the contents of the Grand Jury testimony, and it was passed upon before, but it would seem that now the Court has much more to go on in considering that motion, and I would ask the Court to reconsider it.

THE COURT: Anything you want to say?

MR. HAUSCH: Your Honor, I have read the Grand Jury testimony, and I find nothing in that testimony which would, I feel, in any way be enhanced by the testimony taken on the hearing. I am sure the Court has already reviewed the Grand Jury testimony also and made its decision.

MR. GRASECK: Well, that's my motion, your Honor. I just feel that the outline of the case is much clearer now, and the People's theory is clear to the Court, and I don't know whether -- I feel that now the Court could read the Grand Jury minutes with greater insight into what the case is about, and in the light of the various testimony of the witnesses that have been heard thus far.

THE COURT: Well, it seems to me that the issue when the Court read the Grand Jury minutes was the evidence which was presented to the Grand Jury, and the Court found that sufficient at that time. So, that's determinative, I think, of the question.

I will deny your motion.

(Whereupon, the above hearing was concluded.)

- - -

C E R T I F I C A T I O N :

I hereby certify the above minutes to be true and accurate.

_____

Official Court Reporter

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

No.

- -x

UNITED STATES OF AMERICA ex rel BOSSIE LEE HOLLAND :

Petitioner :

-against- :

COUNTY COURT OF NASSAU COUNTY :

Respondent :

- -x

PETITION FOR A WRIT OF HABEAS CORPUS

I (Jurisdiction)

This is an application for a writ of habeas corpus to relieve the petitioner of an illegal conviction imposed upon him by the State of New York in violation of the Constitution of the United States. A United States District Court is authorized to entertain the application by 28 USC §2241(a).

II (Parties)

Petitioner is a citizen of the United States and a resident of the State of New York. Petitioner is currently released on bail under a stay of execution of his sentence of imprisonment upon the posting of a $1000 unsecured personal

appearance bond. Respondent is the Court in which petitioner was convicted and which has custody of petitioner under the doctrine of Hensley v. Municipal Court, 411 U.S. 345.

III (Circumstances of Crime and Trial)

On January 17, 1975 petitioner was convicted after trial in the County Court of Nassau County (Young, J.) of burglary in the third degree, petit larceny, and possession of burglar's tools and was sentenced to an indeterminate term of imprisonment with a maximum of four years on the former conviction and definite terms of imprisonment of one year each on the latter convictions, to run concurrently.

At the trial, items seized from petitioner's automobile were placed in evidence.

In its findings of fact after a pretrial Search and Seizure hearing the Trial Court found that Detective Donohue of the Nassau County Police Department was advised to investigate the burglary of an office at 95A Nassau Road, Roosevelt, New York. He went to a rear apartment at that address where he encountered petitioner who produced a drivers license when asked for identification. The Detective then requested that petitioner go with him to the First Precinct Stationhouse "for further investigation." Petitioner was taken to the Detective Squadroom where he was advised of his "Miranda" rights and he refused to answer any questions. Petitioner was permitted to telephone an attorney from the stationhouse. The Court found that Detective Donohue subsequently received a phone call from the complainant who advised him of the location of petitioner's car. It found that

the Detective asked for and received petitioner's permission to search the vehicle. From the trunk, Donohue seized a typewriter cover, and from on and under the front seat he seized various tools, a mask and gloves.

The Court found that petitioner was "under arrest" when he first arrived at the stationhouse, but that he had voluntarily consented to the search of his automobile. No specific finding was made as to whether or not there had been probable cause for the arrest.

IV (Claim)

Petitioner contends that the items admitted into evidence at trial were illegally seized from his automobile. Petitioner was arrested without probable cause and the alleged consent to search was the fruit of the illegal arrest.

V (Exhaustion of State Remedies)

Petitioner has exhausted all available state remedies by appealing his conviction to the Appellate Division for the Second Department which affirmed without opinion (Order of December 17, 1975), and by unsuccessfully seeking leave to appeal to the New York Court of Appeals by application to the Hon. Sol Wachtler. A copy of the Appellate Division judgment and Judge Wachtler's certificate denying leave to appeal are attached.

The issues raised in the present application have been raised in the New York Courts. No previous petition for a writ of habeas corpus has been made to this or any other court.

WHEREFORE, petitioner respectfully requests that:

1. A writ of habeas corpus be directed to respondent;

2. Respondent be required to appear and answer the allegations of this petition;

3. Petitioner be relieved of the unconstitutional conviction and be discharged from custody;

4. Petitioner be allowed such other, further and alternative relief as may seem just, equitable and proper under the circumstances.

Michael J. Obus

MICHAEL J. OBUS

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

MICHAEL J. OBUS, being duly sworn, deposes and says:

That he is the attorney for petitioner in the within action, that he has read the foregoing petition and knows the contents thereof; that the same is true to deponent's own knowledge; except as to matters therein stated to be alleged on information and belief, and as to these matters, deponent believes them to be true.

Michael J. Obus
MICHAEL J. OBUS

Sworn to before me this
24th day of February, 1976.

Linda A. DeVito

LINDA A. DeVITO
Notary Public, State of New York
No. 30-4616471
Qualified in Nassau County
Cert. Filed in Nassau County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA ex rel :
BOSSIE LEE HOLLAND :

Petitioner :

-against- :

COUNTY COURT OF NASSAU COUNTY :

Respondent :

- -x

PETITIONER'S MEMORANDUM OF LAW

Respectfully submitted,

JAMES J. McDONOUGH
Attorney for Petitioner
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York
(516) 248-5782

OF COUNSEL:

MATTHEW MURASKIN
MICHAEL J. OBUS

ARGUMENT

THE EVIDENCE SEIZED PURSUANT TO PETITIONER'S CONSENT TO THE SEARCH OF HIS AUTOMOBILE WAS THE INADMISSIBLE FRUIT OF AN UNCONSTITUTIONAL ARREST.

Petitioner was brought to the First Precinct Stationhouse in Nassau County "for further investigation" of a burglary. The Trial Court found that he was under arrest at that time but that petitioner's consent to the search of his automobile shortly thereafter was voluntary. No specific finding on the issue of probable cause for the arrest was made.* Petitioner contends that there was no probable cause for his arrest and that the evidence seized pursuant to his consent was the fruit of that illegal arrest and should have been suppressed. Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S. 471 (1963); cf. United States v. Watson, ___U.S.___, 18 CrL 3051 (decided January 26, 1976).

A.

PETITIONER WAS ARRESTED WITHOUT PROBABLE CAUSE.

Arrests without probable cause for purposes of "investigation" clearly violate the Fourth Amendment to the United States Constitution. Brown v. Illinois, supra, at 602;

*Petitioner objected in the trial court to the admission of the evidence seized from his automobile pursuant to his alleged consent, and a pretrial search and seizure hearing was held. Although the Court did not focus on the issue of probable cause for arrest. the record of that hearing and the trial indicate that no probable cause existed. Cf. Brown v. Illinois, 422 U.S. 590, (1975). This issue was raised in the State courts on appeal and clearly was not deliberately bypassed. United States ex rel Irons v. Montanye, 520 F.2d 646 (2nd Cir., 1975); United States ex rel Vanderhorst v. LaVallee, 417 F.2d 411 (2nd Cir., 1966).

Davis v. Missippi, 394 U.S. 721, 726 (1969); Morales v. New York, 396 U.S. 102 (1969). Probable cause, of course, means a reasonable ground for belief of the guilt of a suspect. Brinegar v. United States, 338 U.S. 160, 175 (1949). Under the circumstances of this case, Detective Donahue, the arresting officer, could have had no such probable cause.

At the Search and Seizure Hearing, Detective Donahue testified that he had first come in contact with petitioner at 1:40 p.m. on April 9, 1974, at which time he informed petitioner that he was investigating a burglary and "asked" him to come to the police station for questioning (S.H. 3, 16; T. 54, 93).* The Trial Court properly found that petitioner was under arrest when he first arrived at the Precinct. United States v. Hall, 421 F.2d 545 (2nd Cir., 1969); People v. P. 21 N.Y.2d 1 (1967). It found "...That he was in custody, and that he was not able to leave, and that he was, in his own mind, reasonably convinced that he was in custody, and that the circumstances justified this." (Minutes of Decision on Hearings, p. 18).

At the time of petitioner's arrest, Detective Donahue had not yet seen the stolen typewriter, had not yet spoken to Arthur Varsallo, the holder of the stolen typewriter, and, of course, had not yet discovered incriminating evidence in petitioner's car. (Minutes of Decision, p. 19; S.H. 5-8, 10, 20; T. 65, 66, 91, 134-137). In short, at the time of his arrest, Donahue had no information which could reasonably have

*(S.H.) refers to Minutes of Search and Seizure Hearing.
(T.) refers to Minutes of Trial.

led him to believe that petitioner had committed the burglary in question. This lack of probable cause is perhaps best evidenced by the fact that Donahue's stated purpose in taking petitioner into custody was to question him in further investigation of the crime (Minutes of Decision, pp. 3, 16; T. 54, 93).

The complainant's telephone call to Detective Donahue, just prior to petitioner's consent to the search of his car, did not add to the establishment of probable cause. While the complainant did alert Donahue to the location of the car in the general vicinity of the burglarized store, he did not supply Donahue with any basis for belief that it might contain the stolen property. (Minutes of Decision, pp. 5, 13, 14; T. 56, 90). Without some information to justify Nelson's conclusion that the evidence might be in petitioner's car no probable cause could exist. See Aguilar v. United States, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). Petitioner's arrest for investigation was clearly based on something far less than probable cause and was therefore unconstitutional.

B.

THE EVIDENCE SEIZED PURSUANT TO PETITIONER'S CONSENT WAS TAINTED BY THE ILLEGAL ARREST.

Evidence seized pursuant to a consent to search by a prisoner arrested without probable cause may be considered the tainted fruit of that unlawful arrest. Brown v. Illinois, supra; Wong Sun v. United States, supra; United States v. Watson, supra; Phelper v. Decker, 401 F.2d 232 (5th Cir., 1968);

gb

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA EX REL.
BOSSIE LEE HOLLAND,

Petitioner

- against -

COUNTY COURT OF NASSAU COUNTY,

Respondent.

----------x

No. 76C 356

Judge Mishler

AFFIDAVIT IN RESPONSE TO ORDER TO SHOW CAUSE ON APPLICATION FOR HABEAS CORPUS

STATE OF NEW YORK)
: SS.:
COUNTY OF NASSAU)

ANTHONY J. GIRESE, being duly sworn, deposes and says:

1. That he is an Assistant District Attorney, of counsel to Denis Dillon, District Attorney of Nassau County, attorney for respondent.

2. That he makes this affidavit in response to an order, issued by Judge MISHLER, on February 25, 1976, directing respondent to show cause why an order should not be entered directing that a writ of habeas corpus should be entered against respondent.

3. Bossie Lee Holland was convicted, after trial, in the County Court of Nassau County (Young, J. and a jury) of Burglary in the Third Degree, Petit Larceny, and Possession of Burglar's Tools. On January 17, 1975, he was sentenced to intermediate concurrent periods of imprisonment for up to four years.

4. Holland appealed his conviction to the Supreme Court of the State of New York in the Second Judicial Department. The conviction was unanimously affirmed, without opinion, on December 17, 1975. Leave to appeal to the New York Court of Appeals (Wachler, J.) was subsequently denied.

5. Holland now seeks a writ of habeas corpus, arguing that evidence which was procured in violation of his Fourth Amendment rights was utilized against him at his trial.

6. For the reasons set forth in the accompanying memorandum of law, the application for habeas corpus relief should be denied.

WHEREFORE, respondent respectfully requests that the petition be denied.

Anthony J. Girese

Sworn to before me this
1st day of April, 1976.

Genevieve A. Bernius

GENEVIEVE A. BERNIUS
NOTARY PUBLIC, State of New York
No. 30-4607532
Qualified in Nassau County
Commission Expires March 30, 19 77

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA EX REL
BOSSIE LEE HOLLAND,

Petitioner

- against -

COUNTY COURT OF NASSAU COUNTY,

Respondent.

----------x

No. 76C 356

Chief Judge Mishler

RESPONDENT'S MEMORANDUM OF LAW

Denis Dillon
District Attorney
Nassau County
Attorney for Respondent
262 Old Country Road
Mineola, New York 11501

William C. Donnino
Anthony J. Girese
Assistant District Attorneys
of Counsel

attorney] and Mr. Sutter gave him some advice. Thereafter, the defendant, of course, refused to sign any statements, having been, according to Mr. Sutter, advised that he shouldn't sign anything except the pedigree sheet and pro forma forms."

* * *

Subsequent Proceedings

Holland was tried and convicted.* On appeal to the Appellate Division, Second Judicial Department, he challenged the validity of the search of his car, claiming that the search was not voluntarily consented to and that the initial detention of Holland amounted to an illegal arrest, thereby tainting the subsequent search of the car. The respondent pointed out that the appellant had not litigated the legality of this detention at the suppression hearing, choosing instead to focus upon the pure voluntariness of the consent viewed in the abstract (see Minutes of Decision on Suppression Hearings, pp. 1-4). Accordingly, respondent argued that since the status of the alleged primary illegality was not litigated below, Holland could not raise a claim of taint on appeal. In the alternative, respondent argued that the evidence found in Holland's car was untainted.

---

* At trial, Robert Nelson, the victim of the burglary, and Detective Donohue, testified concerning the events which led to the defendant's location and detention. That testimony, which "fills in the narrative" of the instant search, is summarized in respondent's brief to the Appellate Division at pp. 3-7.

The Appellate Division unanimously affirmed the conviction without opinion on December 17, 1975. Leave to appeal to the New York Court of Appeals was subsequently denied by Judge Wachtler.

Argument

The Application for Habeas Corpus Relief Should be Denied [answering the Petition].

The petitioner claims that at his trial the state court permitted into evidence articles which were the fruit of an unconstitutional search.* He argues that his consent to search the vehicle, which produced this evidence, was the product of an allegedly illegal arrest, and was therefore tainted beyond redemption. The answer to this claim is threefold. Initially, petitioner, having failed to challenge the legality of the arrest at the suppression hearing, may not now establish this illegality for the purposes of making an argument based on taint. Secondly, the petitioner's initial detention, viewed from the perspective of an incomplete record, was by no means established to be illegal. Thirdly, even assuming that there was an illegal arrest, the petitioner's clearly voluntary and tactically motivated consent to search his vehicle purged any taint which might have flowed from that initial illegality.

---

* We note for purposes of preservation that the Supreme Court is currently considering the question of the scope of habeas corpus review in situations involving the operation of the exclusionary rule. See Wolff v. Rice, 18 Cr. L. 4157. Should the High Court choose to modify the present scope of review in such situations, this petition would most probably be rendered moot.

Waiver

The petitioner's argument is cast in terms of taint; he seeks to establish that there was an illegal arrest, which tainted the subsequent consent. However, at the suppression hearing before the county court, the petitioner did not attempt to establish the predicate for this argument -- he did not attempt to litigate the legality of the initial detention of Holland. Instead, he chose to focus solely on the question of the voluntariness of the consent. Thus, the detective, who had testified on direct examination that he had simply asked "Mr. Holland to accompany me to the station-house" because he "wanted to talk to him further at this time" (3)* was not questioned extensively about this action on cross-examination (12-13). Holland himself was not questioned about this when he took the stand at the hearing (55). And, there was no argument concerning the legality of the initial detention before the decision on the motion (Minutes of Decision, pp 5-10). The court, in its findings, did opine that "he was in custody (Minutes of Decision, p. 18) but this was apparently merely considered to be one factor to be taken into consideration by the court in reviewing the voluntariness of the consent. The county court did not rule on the question of whether the initial detention was legal.

In the Appellate Division, Holland did argue taint, albeit admitting that the record concerning the events of the initial detention was incomplete (the appellant's brief to that court, p. 23). Respondent noted the existence of a

---

* Numbered references are to the Suppression Hearing.

waiver of this issue (respondent's brief, p. 29). The Appellate Division, which affirmed the conviction without opinion, obviously might have based its decision on the waiver.

The test to be applied to determine whether this failure to raise the claims of taint in the state courts precludes it from being argued herein is "whether there was a deliberate by-pass [of] the orderly procedure of the state courts." Fay v. Noia, 372 U.S. 391 (1963); Henry v. Mississippi, 379 U.S. 433 (1965); c.f. United States ex rel. Adams v. Bensinger, 507 F.2d 390 (7th Cir. 1974); cert. denied ___ U.S. 2d ___ (1975); United States ex rel. Irons v. Montanye, 520 F.2d 646 (2d Cir. 1975); United States ex rel. Agron v. Herold, 426 F.2d 125 (2d Cir. 1970). Here, it would appear that Holland's decision not to litigate the question of taint was deliberate; he may have simply felt that he had a better choice of establishing the involuntariness of the consent in the abstract. Compare United States ex rel. Adams v. Bensinger, supra. Accordingly, the issue was waived for purposes of habeas corpus review.

Probable Cause

Assuming that petitioner has not waived the issue, he still must establish the primary illegality as a predicate for his argument based on taint. On the basis of this incomplete record, it is by no means certain that this can be

done. The county court, as previously noted, found that Detective Donohue had taken Holland into "custody" for constitutional purposes when he asked the petitioner to accompany him to the stationhouse.* However, there was no ruling as to the legality of this custody.

Assuming arguendo that there was an arrest at all, that arrest was legal. The officer, at the time he asked Holland to accompany him, knew that there had been a burglary and that a typewriter was taken. He knew that Holland frequented an apartment in the rear of the store (24, T.53**). He knew that the victim had seen Holland that morning, two blocks from the store (T. 164). He was told by the victim that Holland had attempted to sell what appeared to be stolen goods to the victim, just a few days before the burglary (T. 163, 178, 183-85). When the detective and the complainant first confronted Holland in the apartment in the rear of the store, Holland immediately accused the victim of accusing him of taking the typewriter, although the victim had said

---

* Itself a debatable finding. The detective testified that he had merely asked Holland to accompany him so that the pair could "talk." See United States v. Beckham, 505 F.2d 1318 (5th Cir. 1975).

** References preceded by a "T" are to Trial testimony. Reference to this proceeding is necessary in this unique situation because of the insufficiency of the suppression hearing, which was caused by petitioner.

nothing whatsoever to him at this point (24-25, 39). Finally, it appears from the trial record that when the detective, before "arresting" Holland, went to his address and spoke to the woman he was living with, she told him that Holland was a typewriter salesman (T. 111).

Under all of these circumstances, probable cause for Holland's arrest existed. Cupp v. Murphy, 412, U.S. 291 (1973). And if the initial arrest was not illegal, of course there could be no tainting of the subsequent consent to search.